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REPORTS OF CASES

DECIDED BETWEEN

MAY 5, 1989 and JULY 27, 1989

IN THE

Supreme Court of Nebraska

VOLUME CCXXXII

STEVEN R. SCHROEDER

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By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Robert T. Finn	Tecumseh
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Cedar, Dakota, and Dixon	Robert E. Otte	Dakota City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Buffalo and Sherman	Dewayne Wolf	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	John P. Murphy Donald E. Rowlands II	North Platte North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Jack H. Hendrix	McCook
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	Edward E. Hannon	O'Neill
Sixteenth	Box Butte, Dawes, Grant, Morrill, Sheridan, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Gage and Jefferson	William B. Rist	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, Garden, and Kimball	John D. Knapp	Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Ronald D. Olberding	Burwell
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	John C. Whitehead John M. Brower	Columbus Fullerton

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Thomas J. Gist	Falls City
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Albert C. Walsh	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Janice L. Gradwohl	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Joseph S. Troia	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett O. Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	J. Patrick McArdle	Wilber
		Daniel Bryan, Jr.	Geneva
Eighth	Cedar, Dakota, Dixon, and Thurston	Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	James J. Duggan Stephen P. Finn Philip R. Riley	Norfolk Neligh Creighton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack Robert Ott	Hastings Hastings
Eleventh	Hall and Howard	Richard E. Weaver David A. Bush	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John P. Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	August F. Schuman Alan L. Brodbeck	Ainsworth O'Neill
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	James L. Macken G. Glenn Camerer	Gering Gering
Eighteenth	Gage and Jefferson	Steven Bruce Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas H. Dorwart C. G. Wallace	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith J. Kovanda Robert E. Wheeler	Burwell Broken Bow
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gerald E. Rouse Gary F. Hatfield Lyle Winkle	Columbus Central City Columbus

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 86-369: **Gering National Bank v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-527: **Toy National Bank v. Tetherow.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 86-986: **Toy National Bank v. Tetherow.** Pursuant to stipulation of the parties, matter remanded to the district court for further proceedings.

Nos. 87-272, 87-273: **Liebentritt v. Nebraska Methodist Hospital.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-312: **Glover v. Department of Correctional Services.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-965: **Blue v. American Interinsurance Exch.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-339: **Thorell Constr. v. Travelers Ins.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-340: **Thorell Constr. v. Consolidated Brokers.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-343: **Krass v. Stednitz.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-369: **Certificate of Need Review Committee v. Bryan Enterprises.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-427: **Moxham v. Moxham.** Stipulation allowed; appeal dismissed.

No. 88-751: **State v. Burke.** By order of the court, appeal

dismissed for failure to file briefs.

No. 88-803: **State v. Krimmel.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-845: **Deans v. Black & Decker Mfg.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-876: **Nelson v. Cool.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-886: **Mertes v. Mertes.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-913: **Jizba v. City of Omaha.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-936: **State v. West.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-963: **K N Energy, Inc. v. City of Indianola.** Stipulation allowed; appeal dismissed.

No. 88-969: **Palmer v. Hall.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-996: **Brehm Enterprises v. The Pizza Inn.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 88-997: **Nebraska Assn. of County Officials v. Boehm.** Stipulation allowed; appeal dismissed.

No. 88-1016: **State v. Jones.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-1032: **In re Interest of Tyler.** By order of the court, appeal dismissed for lack of a final order.

No. 88-1044: **State v. McFarland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-1045: **State v. McFarland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-1055: **State v. Gibson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see rule 7B(2).

No. 88-1066: **State v. Sims.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-1067: **In re Interest of Ryan.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1081: **Briggs v. Benda.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-008: **State v. Bernhardt.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-022: **State v. Waite.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-025: **State v. Green.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-030: **Ranch & Farm Agr. v. AID Ins. Co.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 89-035: **In re Interest of Tyler.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-036: **State v. Speicher.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-038: **State v. McNichols.** Affirmed. See Rule 7A(1).

No. 89-042: **Douglas County Bank & Trust Co. v. Lies.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-045: **Lange v. Gunter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-050: **State v. Culkins.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-053: **Anderson Electric Co. v. Scott Knudsen Homes.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-058: **State v. Buggs.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-066: **State v. Davenport.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-069: **State v. Arguello.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-073: **Reed v. Gooch Foods, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-077: **Samus v. Samus.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-078: **State v. Kubes.** Judgment affirmed. See Rule 7A(1).

No. 89-082: **Hilliard v. Scottsbluff National Bank.** Stipulation allowed; appeal dismissed.

No. 89-084: **Lundstrom v. George A. Hormel & Co.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 89-089: **Westin v. Westin.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-101: **State v. Kloss.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-102: **Blank v. Blank.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-106: **State v. Contreras.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-107: **Jensen v. McDonald's, Inc.** Stipulation allowed; appeal dismissed.

No. 89-112: **Thoresen v. Thoresen.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-115: **State v. Kellogg.** Stipulation allowed; appeal dismissed.

No. 89-120: **State v. Beckwith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-123: **State v. Brewer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-126: **In re Interest of Shaw.** Stipulation allowed; appeal dismissed.

No. 89-133: **State v. Williams.** Affirmed. See Rule 7A(1).

No. 89-137: **Kersch v. Pfeifer.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-145: **State v. Black.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-153: **McGinn v. McGinn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-161: **State v. Brooks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-162: **State v. Brooks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 89-171, 89-172: **John Hancock Mutual Life v. Brush.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 89-173: **State v. Chavez.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-179: **State v. Akin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-181: **Markovic v. Department of Appeal Board.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-182: **State v. Walker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-182: **State v. Walker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-183: **State v. Kramer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-185: **State v. Adams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-194: **Contreras v. Higgins.** Stipulation allowed; appeal dismissed.

No. 89-198: **State v. Boyd.** Affirmed. See Rule 7A(1).

Nos. 89-203, 89-204, 89-205, 89-206: **Bethesda Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 89-208: **State v. Muhleka.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-218: **State v. Dack.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-222: **State v. Purdy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-227: **State v. Boswell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-233: **State v. Stratton.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-234: **State v. Springett.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-236: **State v. Velder.** Affirmed. See Rule 7A(1).

No. 89-247: **Blount v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-248: **Brown v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-249: **Bunton v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-250: **Bunton v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-251: **Cleveland v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-252: **Clinkscale v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-253: **Cooper v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-254: **Freeman v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-255: **Gantt v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-256: **Harris v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-257: **Hunter v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see

Rule 7B(1).

No. 89-258: **James v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-259: **Johnson v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-260: **Jones v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-261: **Lewis v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-262: **Loud v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-263: **Marrs v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-264: **Martin v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-265: **Mays v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-266: **McGee v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-267: **Moore v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-268: **Nedd v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-269: **Newsome v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-270: **Price v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see

Rule 7B(1).

No. 89-271: **Rideout v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-272: **Scott v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-273: **Smith v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-274: **Straughn v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-275: **Straughn v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-276: **Thomas v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-277: **Veland v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-278: **Willis v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-279: **Young v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-280: **McClarty v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-281: **Easter v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-282: **Johnson v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-283: **Taylor v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see

Rule 7B(1).

No. 89-284: **Moore v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-285: **Winsley v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-286: **Burns v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-287: **Bradley v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-288: **Hunter v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-289: **Moreland v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-290: **Johnson v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-291: **Mitchell v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-292: **Whitfield v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-293: **Creighton v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-294: **Johnson v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-295: **Barnes v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-296: **Hinton v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see

Rule 7B(1).

No. 89-297: **Moore v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-298: **Wilson v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-299: **Relford v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-300: **Penney v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-301: **Emerson v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-302: **McElwee v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-303: **Williams v. Fitzgibbons.** Motion of appellee for summary dismissal due to lack of jurisdiction sustained; see Rule 7B(1).

No. 89-308: **State v. Kern.** Affirmed. See Rule 7A(1).

No. 89-309: **State v. McNeil.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-313: **Collection Assoc. v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-322: **State v. Dorsey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-323: **State v. Fentress.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-326: **State v. Beck.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-328: **State v. Kelly.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-354: **State v. Wells.** By order of the court, appeal

dismissed for failure to file briefs.

No. 89-361: **State v. Weinell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-380: **State v. Brown.** Affirmed. See Rule 7A(1).

No. 89-381: **Vonseggern v. Vonseggern.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-399: **Cole v. Nebraska State Board of Parole.** Appeal dismissed. See Rule 7A(2).

No. 89-415: **State v. Olson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-447: **State v. Nebraska Assn. of Public Employees.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-451: **State v. Edwards.** Affirmed. See Rule 7A(1).

No. 89-455: **In re Interest of Weigert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-462: **Rawson v. Rawson.** Stipulation allowed; appeal dismissed.

No. 89-464: **State v. Wells.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-465: **Balfany v. Balfany.** Appeal dismissed. See Rule 7A(2).

No. 89-473: **Miller v. Miller.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-477: **Allen v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-490: **Jensen v. Kriger.** Appeal dismissed. See Rule 7A(2).

No. 89-491: **State v. Mullen.** Appeal dismissed. See Rule 7A(2).

No. 89-507: **Abdullah v. Department of Correctional Services.** Appeal dismissed. See Rule 7A(2).

No. 89-508: **State v. Reed.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-675: **Kubalek v. Kubalek.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

DONALD J. GRUBER, APPELLANT, V. COUNTY OF DAWSON, NEBRASKA, APPELLEE.

439 N.W.2d 446

Filed May 5, 1989. No. 87-392.

1. **Injunction: Proof.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him or her to relief.
2. **Equity: Injunction: Appeal and Error.** In an appeal of an action in equity such as one seeking an injunction, the Nebraska Supreme Court tries the factual issues raised by appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court; however, where credible evidence is in conflict on material issues of fact, it considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judges: Appeal and Error.** Where a trial judge as the finder of fact has viewed the premises, but the record does not reveal what the judge saw nor what findings the judge made as a result of the view, the Nebraska Supreme Court gives no weight to the fact that the view was made.
4. **Waters: Words and Phrases.** A statutory watercourse is any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water or a river or brook.
5. _____: _____. A natural drainageway develops when surface waters concentrate and gather in volume so as to lose their character as diffused surface waters and flow into any well-defined course, whether it be a natural depression, ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land.
6. **Waters.** The mere presence of an artificial element in a drainageway does not destroy its characterization as a natural drainageway; it is only where an essential part of the drainageway is artificial or manmade that such characterization may be precluded.
7. _____. A natural drainageway must be kept open to carry water into streams, and as against rights of an upper proprietor, a lower proprietor cannot obstruct surface water which is moving in a natural drainage channel or depression.
8. _____. One building a structure across a natural drainageway has a continuing duty to provide natural passage for water reasonably anticipated to move in the drainageway occupied by the obstruction.
9. _____. The duty to refrain from structural obstruction of a natural drainageway is imposed on private proprietors and public officials as well.

10. **Waters: Proof.** To prevail under the theory that an altered road obstructed a natural drainageway, the complaining landowner must prove by a preponderance of the evidence that a drainageway traversed the road before the road was altered, that the drainageway was formed and existed in a state of nature, and that it carried water from a higher to a lower estate.
11. **Waters: Injunction.** Where an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon a proper showing.
12. **Waters: Words and Phrases.** "Diffused surface water" is water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow.
13. **Waters.** Surface waters may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability if it is necessary and done without negligence.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded with direction.

Willard Weinhold, of Weber & Weinhold Law Office, for appellant.

Barbara J. Koperski, Deputy Dawson County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff-appellant, Donald J. Gruber, brought this action against defendant-appellee, County of Dawson, to obtain relief from the pooling of water on his property allegedly resulting from the county's paving of the road adjoining his land. The district court dismissed plaintiff's petition, which seeks to enjoin the county "from obstructing the natural drainage" of water from his property and from negligently repelling surface waters emanating from said property. Plaintiff's five assignments of error may be summarized as asserting the district court erred in finding he failed to sustain his burden of proof and in thus concluding he is not entitled to the injunctive relief he seeks. We reverse and remand with direction.

Plaintiff owns a quarter section of land located in Dawson County. Plaintiff's father farmed the land from 1933 to 1957, at which time plaintiff began to farm it. The property is abutted on the north by a county road and on the west by Highway 21.

Rough, hilly pastureland lies to the south and west of the property, which property is crossed by two canals. The "Orchard and Alfalfa Canal" traverses the northeast corner of the property. The "30 Mile Canal" runs across the southern end of the property. A farmyard, on which various buildings are situated, is located at the northeast corner of the property. A cattle pasture lies directly south of the farmyard.

Two areas of drainage exist on the property. The first consists of water draining off hills and canyons located to the west and south of the property. At least since 1933, these waters entered the property from under a bridge located across Highway 21 and about halfway up the western border of the property and through a visible natural ditch, swale, or depression 4 to 5 feet deep and 5 to 8 feet wide. This natural depression carried the water from the point it entered the property northeast across the land to another bridge located on the county road at about the midpoint of the northern border of the property. The natural depression became shallower as it approached the county road bridge.

In the late 1940s, the father leveled and smoothed the south half of the property. At that time, he also eliminated the natural depression that had carried the water northeasterly between the two bridges, and installed a manmade ditch, 3 feet deep and 25 feet wide, to replace it. Water still entered the property under the highway bridge, but the manmade ditch changed the drainage so that water traveled due north along the western edge of the property to the county road and turned and traveled east along the south side of the road until reaching the county road bridge through which the natural depression had drained. Until the road was paved, both before and after construction of the manmade ditch, water either flowed under the county road bridge or crossed over the top of the road in the northeast corner of the property, where the road was the lowest. Plaintiff testified that water crossed the road almost every year—according to him, the ditch south of the road was "so shallow that it didn't take a lot of water to force it across the road."

The second area of drainage on the property consists of precipitation waters which fall upon the property. The father

testified that both before and after he leveled his land, surface waters from precipitation generally drained across the property to the northeast and eventually entered the ditch to the south of the county road, joining the waters from the manmade ditch.

Before the county road was paved, water which crossed over the road to the north would flow northeast across farmland and eventually enter the Orchard and Alfalfa Canal, which carried the water into the Platte River. In the event the canal overflowed, the water drained east into a "Tri One-County" ditch and through it to the Platte River.

At some point, the Grubers installed a dike along the southern edge of the farmyard to divert water which emanated from the cattle pasture south of the farmyard into the Orchard and Alfalfa Canal. According to plaintiff, after the dike was installed, "very little or no water [came] through that yard from the south . . . ."

There was also testimony that the Orchard and Alfalfa Canal had been dredged a year or two before 1981. In his pretrial deposition plaintiff stated that when the canal was dredged, dirt placed on the west side of the canal blocked the spot where water used to enter the canal from the artificial dike to the south of the farmyard, causing water to enter his farmyard. At trial, he stated, "[T]hat's what caused us some trouble when we got this rain in 1981."

At one time, additional water entered the property through openings located along the 30 Mile Canal. Both plaintiff and the father testified that, eventually, the openings along the 30 Mile Canal were sealed. According to plaintiff, after the openings were sealed, almost all of the water flowing through the property came from the aforedescribed first drainage area.

From 1972 to 1974, the county paved the county road to the north of plaintiff's property. According to the county engineer who designed the drainage structures under the road when it was paved, the elevation of the road was increased "about a foot and a half down by the farmstead and then as you worked back, it varied from two foot to five tenths, or something like that." Three culverts were installed or replaced under the road: a 36-inch culvert was installed where plaintiff's manmade ditch reached the road, a 36-inch culvert replaced an existing one of

the same size where the county road bridge had been located, and a 24-inch culvert was installed in the northeastern corner of plaintiff's property.

After the road was paved, very little water passed over the top of the road. Plaintiff testified that after the road was paved, the culverts could not carry the water, and when the south road ditch was full, the water backed up into the yard. What water exited the property through the culverts under the road was carried east through an open ditch on the north side of the road into a reservoir overflow area west of the Orchard and Alfalfa Canal, where the water remained until it could drain through a pipe under the canal and east into the Tri One-County ditch.

In 1959 or 1960, the Grubers erected a steel grain storage building directly east of the house situated in the farmyard described earlier. Both plaintiff and the father testified that although water had always moved through the farmyard, never before 1972, when pavement of the county road began, had floodwaters collected in the farmyard itself or where the steel building was built. Moreover, plaintiff testified that several times between 1972 and 1981, water collected in the building and, in July 1981 and June 1984, stood to a height of 6 1/2 to 7 inches.

An engineer called as an expert witness by plaintiff surveyed the county road after it had been paved. He calculated that after a 3 1/2- to 4-inch per hour rain, 230 cubic feet per second of water would drain across the property to the south side of the county road, 160 cubic feet per second draining from the hills and canyons under the highway bridge and 70 cubic feet per second draining from the fields. He determined that the three culverts installed by the county under the paved road had a drainage capacity of only 146 cubic feet per second: the culverts at the end of the manmade ditch and where the old county road bridge used to be each had a capacity of 60 cubic feet per second, and the culvert in the northeastern corner of the property had a capacity of 26 cubic feet per second. He opined that the culverts lacked the capacity to carry the anticipated waterflow, having capacity only to carry about 63 percent of the total water drainage.

Plaintiff's expert further opined that the velocity of water

through plaintiff's manmade waterway was greater than it had been through the natural depression. While this witness opined in his pretrial deposition that the county was not negligent in designing the drainage system under the road, he also said that the county should have redesigned the drainage system and that he would not have approved the drainage structures the county used. At trial, plaintiff's expert testified,

> I would have put a larger culvert at the west end, the end of that man-made drain way through the field . . . .
>
> . . . .
>
> . . . Simply because it carries the water from the culvert under the highway [21] to the county road and since that box culvert under the highway has such a large cross-sectional area and can carry so much water, I would have taken a hard look at the size of the culvert at the end of that drain way.

This witness testified further that sufficient capacity existed in the ditch on the north side of the road to carry the water which passed under the road, through the culverts, and east toward the reservoir area.

The county engineer claimed that the calculations made by plaintiff's expert were theoretical, but conceded that when he designed the water drainage system, he did not take into account the rainfall patterns in the area. He expressed the view that it was possible some of the flooding on plaintiff's property was caused by the paving of the road, but when asked if plaintiff could have "suffered the same damage" even if the road had not been improved, assuming a "storm [of] sufficient intensity," he replied affirmatively. He acknowledged, however, that he did not design the drainage system in accordance with "the ordinary standards in the engineering profession available in 1972," but did what "was to the best of [his] ability, according to the conditions that we had to deal with that were impossible."

The record reveals that a break in the bank of the 30 Mile Canal occurred in 1981 to the west of plaintiff's property, but that none of the water from the breakout flowed onto plaintiff's property. Further, while there is evidence that the 30 Mile Canal overran its banks in 1981 and 1984, there is no

evidence that this occurred on plaintiff's property.

We begin our analysis by recalling that a party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him or her to relief. *Federal Land Bank of Omaha v. Swanson,* 231 Neb. 868, 438 N.W.2d 765 (1989); *Belsky v. County of Dodge,* 220 Neb. 76, 369 N.W.2d 46 (1985). We also bear in mind that in an appeal of an action in equity such as one seeking an injunction, this court tries the factual issues raised by appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court; however, where credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Federal Land Bank of Omaha v. Swanson, supra*; *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988); *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987); Neb. Rev. Stat. § 25-1925 (Reissue 1985). In that connection, where the district judge as the finder of fact has viewed the premises, which the district court judge did here, but the record does not reveal what the judge saw nor what findings the judge made as a result of the view, we give no weight to the fact that the view was made. *Johnson v. NM Farms Bartlett, supra.*

We now turn our attention to the first drainage area, that is, the water which flows through plaintiff's manmade ditch. The initial inquiry is whether that ditch is a statutory watercourse. Such a watercourse is defined as " '[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook . . . .' " *Belsky v. County of Dodge, supra* at 81, 369 N.W.2d at 51; Neb. Rev. Stat. § 31-202 (Reissue 1988). A watercourse need not flow continuously, but it must have a well-defined and substantial existence. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984); *Northport Irr. Dist. v. Jess*, 215 Neb. 152, 337 N.W.2d 733 (1983).

The evidence does not convince us that the manmade ditch is a statutory watercourse. Although plaintiff testified that the ditch was a "depression or draw" 3 feet below the surrounding

lands, the ditch does not appear to have a direct "continuous outlet to a stream of water, or river or brook." Before the county road was paved, water which crossed over the road to the north from the ditch would first flow northeast across farmland and either enter, at a point north of plaintiff's property, the Orchard and Alfalfa Canal, which drained east into the Platte River, or, if the canal overflowed, would proceed east into the Tri One-County ditch and through it to the Platte River.

The evidence does, however, convince us that the manmade ditch is a natural drainageway which existed on the property at the time the county road was paved. A natural drainageway develops when diffused surface waters concentrate and gather in volume so as to lose their character as diffused surface waters and flow into any well-defined course, whether it be a natural depression, ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land. *Holman v. Papio Nat. Resources Dist.*, 228 Neb. 94, 421 N.W.2d 430 (1988); *Belsky v. County of Dodge, supra*; *Shotkoski v. Prososki*, 219 Neb. 213, 362 N.W.2d 59 (1985).

It is not important to characterizing a manmade drainageway as a "natural drainageway" that it has artificial elements. In *Holman v. Papio Nat. Resources Dist., supra* at 101, 421 N.W.2d at 435, we stated that "the mere presence of an artificial element in a drainageway does not destroy its characterization as a natural drainageway. It is only where an essential part of the drainageway is artificial or manmade that such characterization may be precluded." See, also, *Belsky v. County of Dodge, supra*. Even after construction of the ditch, water was nevertheless carried across the property from the same entrance to the same exit.

A natural drainageway must be kept open to carry water into streams, and as against the rights of an upper proprietor, a lower proprietor cannot obstruct surface water which is moving in a natural drainage channel or depression. *Belsky v. County of Dodge, supra*. One building a structure across a natural drainageway has a continuing duty to provide natural passage for water reasonably anticipated to move in the drainageway occupied by the obstruction. *Id.* The duty to refrain from

structural obstruction of a natural drainageway is imposed on private proprietors and public officials as well. *Id.*

To prevail under the theory that an altered road obstructed a natural drainageway, the complaining landowner must prove by a preponderance of the evidence that a drainageway traversed the road before the road was altered, that the drainageway was formed and existed in a state of nature, and that it carried water from a higher to a lower estate. *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985). See, also, *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987). Plaintiff has succeeded in proving these three elements with respect to the waters carried through the manmade ditch. It is clear that a natural drainageway carried water across plaintiff's property and either over the county road or under the county road bridge. Further, it is clear that the water was carried from a higher to a lower estate.

Where an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon a proper showing. See *Wilson Concrete Co. v. County of Sarpy*, 189 Neb. 312, 202 N.W.2d 597 (1972).

Having dealt with the first area of drainage from plaintiff's property, we turn our attention to the second area of drainage, which involves precipitation waters which fall upon the property. These waters may be characterized as diffused surface waters. "Diffused surface water" is water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow. *Shotkoski v. Prososki, supra.* Surface waters may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability if it is necessary and done without negligence. *Shotkoski v. Prososki, supra*; *Krafka v. Brase*, 218 Neb. 335, 353 N.W.2d 276 (1984); *LaPuzza v. Sedlacek*, 218 Neb. 285, 353 N.W.2d 17 (1984); *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982).

The evidence satisfies us that these surface waters pool on plaintiff's farmyard because the county negligently failed to take the relevant rainfall patterns into account when designing the drainage systems involved with paving the county road.

We have said:

> " 'Failure to make proper provision for the flow of water under a bridge or culvert has been held to impose liability, although such bridge or culvert may be constructed according to approved principles of engineering; the fact that it does materially obstruct the flow being held to be in itself evidence that it was not properly constructed, regardless of the principles upon which it was built.' "

Belsky v. County of Dodge, supra at 85, 369 N.W.2d at 53.

The county, however, claims other factors combined with the road changes to cause such pooling of water on the property. Taking these claims in turn, the county first asserts that overflows of the Orchard and Alfalfa Canal and 30 Mile Canal contributed to the flooding; however, the county presented no evidence that the overflow of either canal contributed to the flooding problem on the land. The county next contends that the dredging of the Orchard and Alfalfa Canal so as to block water from the dike to the south of plaintiff's farmyard from entering the canal contributed to the pooling of water in that area. However, the dredging did not occur until 1979 or 1980, and plaintiff testified that water collected in his steel building several times between 1972 and 1981. Finally, the county urges that the increase in velocity of water through the manmade ditch beyond the velocity that existed in the natural depression contributed to the pooling of water in the farmyard. Once again, there is no evidence to suggest that such is the case. Indeed, the manmade ditch was constructed in the late 1940s, and pooling did not occur until after the road was paved. In summary, the evidence does not convince us that factors other than the paving of the road caused the flooding of which plaintiff complains.

Accordingly, we reverse the judgment of the district court and direct that it enter an injunction preventing the county from obstructing the natural drainage of water from plaintiff's property and from negligently repelling such surface waters as fall, arise, or flow upon said property by making provision to drain 230 cubic feet of water per second from plaintiff's land.

REVERSED AND REMANDED WITH DIRECTION.

IN RE APPLICATION OF GENERAL MOTORS CORPORATION, A DELAWARE CORPORATION. GENERAL MOTORS CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. O'DANIEL OLDSMOBILE, INC., A NEBRASKA CORPORATION, APPELLEE.

439 N.W.2d 453

Filed May 5, 1989. No. 87-434.

1. **Administrative Law: Appeal and Error.** Appeals from the district court to this court in cases involving administrative orders are heard de novo on the record.
2. **Appeal and Error.** In reviewing a record de novo, this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court.
3. **Administrative Law: Motor Vehicles: Franchises: Good Cause: Proof.** In actions proceeding pursuant to Neb. Rev. Stat. §§ 60-1401 et seq. (Reissue 1988), the burden of establishing the existence of good cause for establishing a new dealership, and that such dealership is in the public interest, is upon the franchisor.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed.

Stephen H. Nelsen and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, and H. Richard Elmquist for appellant.

Martin A. Cannon, of Matthews & Cannon, P.C., for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

WHITE, J.

This is an appeal taken by General Motors Corporation (General Motors) following a determination by the Nebraska Motor Vehicle Industry Licensing Board (board) denying General Motors' application for a new dealer point in the Omaha multiple dealer area. This appeal is taken pursuant to the Nebraska Administrative Procedure Act, specifically, Neb. Rev. Stat. § 84-918 (Reissue 1981) (see Neb. Rev. Stat. § 60-1435 (Reissue 1988)). The decision of the board was entered pursuant to the powers granted to it by Neb. Rev. Stat.

§§ 60-1415, 60-1422, and 60-1434 (Reissues 1984 & 1988). Specifically, the board found that General Motors had not established the need for a new dealer point because it had not met the good cause requirement of § 60-1434 (Reissue 1988). Appeals from the district court to this court in cases involving administrative orders are heard de novo on the record. § 84-918. Because our review is de novo, the facts in this case must be examined in detail. However, before an exhaustive review is taken, a brief perusal of the relationship of the parties to this action must be undertaken.

Before this examination is commenced, some terms used by General Motors in conducting its corporate surveys must be defined. Multiple dealer areas (MDAs), an internal geographical designation given by General Motors, one of which includes Omaha and Council Bluffs, Iowa, are broken down into AGSSAs. AGSSA is an acronym for area of geographic sales and service advantage. The division of MDAs into AGSSAs is based on census tract maps and registration data provided by R.L. Polk Company, the primary source for registration data in the automotive industry. The AGSSAs are established by reference to distances from the dealerships, traffic flows, and natural barriers. The AGSSAs are used solely for the purpose of General Motors' evaluations and do not represent assigned boundaries for dealers.

In 1958, Bernard O'Daniel came to Omaha to take over the only Oldsmobile dealership in Omaha. Nearly 30 years later, the O'Daniel dealership, O'Daniel Oldsmobile, Inc. (O'Daniel), remains the only Oldsmobile dealership in the city of Omaha. However, throughout this period there have been two Oldsmobile dealerships in the Omaha MDA. The other Oldsmobile dealer in the Omaha MDA is McIntyre Oldsmobile-Cadillac, Inc., located in Council Bluffs, Iowa. General Motors had two witnesses testify in support of its application for a new dealership. John Currey, Oldsmobile's Omaha zone manager, testified concerning General Motors' lengthy evaluation of the Omaha market to determine whether an additional dealership would be appropriate. Further, Currey testified regarding the performance of both O'Daniel and McIntyre. Luigi DiLalla was the other witness called by General

Motors. He is a member of the General Motors survey department. The survey department has the responsibility of independently evaluating market areas to assist in determining whether a new dealer point should be established.

Two witnesses also testified on O'Daniel's behalf. Bernard and Michael O'Daniel, the chairman of the board and president, respectively, testified concerning the investment made in the O'Daniel dealership through the years and the contacts they have had with the management of General Motors.

The process for determining whether a new dealer point was necessary to ensure adequate representation of the growing Omaha area was explained in detail by Currey. In 1980, when Currey became manager of the Omaha zone, he analyzed the markets and determined that the dealers were not performing as well as an average dealer in the zone. Finally, in August of 1982, he told O'Daniel that he would recommend General Motors do a survey to see if additional representation was needed in the area. A survey was conducted by General Motors. This survey considered, among other things, the sales registrations in the various AGSSAs, dealer profit, and the experience of the existing dealers. If the dealer is not found to be particularly profitable, General Motors will initially see if this inefficiency is due to an operation difficulty rather than evidence of need for an additional dealer. Additionally, General Motors examines demographics regarding population, population trends, and population income. Both McIntyre and O'Daniel were notified of the preliminary conclusion to seek an additional dealership and were invited to offer any input they felt relevant. Neither dealer offered any input into the evaluation process. After the survey was completed, on July 2, 1984, General Motors sent letters to O'Daniel and McIntyre notifying them of its decision to proceed with the establishment of an additional dealer point in the southwest sector of the MDA.

The appellant, General Motors, assigns two errors. General Motors contends the district court erred in affirming the licensing board's order, which failed to give due consideration to all material elements of the licensing act relating to the

General Motors application, and in finding that the licensing board's order is supported by the evidence.

In reviewing a record de novo, "this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court . . . ." *Schmeckpeper v. Koertje*, 222 Neb. 800, 803, 388 N.W.2d 51, 53-54 (1986).

Although we have not as yet decided an appeal from a licensing board decision to deny a requested franchise, pursuant to § 60-1434, we have decided actions prosecuted under the statute based upon termination of a franchise. See *American Motors Sales Corp. v. Perkins*, 198 Neb. 97, 251 N.W.2d 727 (1977). Nebraska is not alone in having this type of regulatory legislation regarding the establishment or termination of motor vehicle franchises. A similar California statute was held constitutional by the U.S. Supreme Court in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978). It is primarily the disparity in bargaining power between automobile manufacturers and their dealers that prompted Congress, Nebraska, and at least 23 other states to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. See *New Motor Vehicle Bd. of Cal., supra*.

The Nebraska motor vehicle industry licensing act, Neb. Rev. Stat. §§ 60-1401 to 60-1440 (Reissues 1984 & 1988), contains the requirements that franchisors must comply with before establishing an additional dealership for a line-make already represented within a community. Section 60-1422 (Reissue 1988) provides:

> No franchisor shall enter into any franchise for the purpose of establishing an additional motor vehicle . . . dealership in any community in which the same line-make is then represented, unless the franchisor has first established in a hearing held under the provisions of this act that there is good cause for such additional motor vehicle . . . dealership under such franchise, and that it is in the public interest.

Section 60-1434 (Reissue 1988) provides guidance to the board when it is making its "good cause" determination concerning the granting of a new franchise:

> In determining whether good cause has been established for entering into an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> (1) Amount of business transacted by other franchisees of the same line-make in that community;
>
> (2) Investment necessarily made and obligations incurred by other franchisees of the same line-make, in that community, in the performance of their part of their franchises;
>
> (3) Permanency of the investment;
>
> (4) Effect on the retail motor vehicle business as a whole in that community;
>
> (5) Whether it is injurious to the public welfare for an additional franchise to be established; and
>
> (6) Whether the franchisees of the same line-make in that community are providing adequate consumer care for the motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer products of the line-make which shall include the adequacy of motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealer service facilities, equipment, supply of parts and qualified service personnel.

The appellant contends that the district court was in error in affirming the licensing board's order because the board failed to give consideration to all material elements of the licensing act. Whether the board committed error in its considerations need not concern us in this appeal, however, because our review is de novo, and, consequently, we must make independent factual findings. In light of our standard of review, we will examine each statutory criterion in detail.

It is important to note that the franchisor, General Motors, has the burden of establishing the existence of good cause for establishing the dealership and that such dealership is in the public interest. § 60-1422. In determining good cause, we

consider the following.

I. "AMOUNT OF BUSINESS TRANSACTED BY OTHER FRANCHISEES OF THE SAME LINE-MAKE IN THAT COMMUNITY." § 60-1434(1).

1. In the Omaha community, there are currently two Oldsmobile dealers: McIntyre and O'Daniel. This community was defined by General Motors. General Motors divides its dealers into MDAs, one of which includes both O'Daniel and McIntyre as members.

2. O'Daniel sold just over 1,000 cars in 1985.

3. O'Daniel sold almost every car supplied and contends it would have sold more had more cars been supplied.

4. However, how many cars O'Daniel was to have available for sale was determined by a General Motors distribution system based upon past sales rates and current inventory. This system applies equally to all Oldsmobile dealers throughout the nation.

5. In order to present a frame of reference within which to consider the amount of business conducted by McIntyre and O'Daniel, these sales data need to be compared to performance levels of other Oldsmobile dealers, both nationally and throughout the Omaha zone.

6. General Motors compares the Oldsmobile registrations in a given MDA to the total industry registrations in the MDA to determine Oldsmobile's percentage of the market, and then compares that percentage to both national and zone average percentages.

7. The Omaha zone is comprised of similar markets in Nebraska, Iowa, and South Dakota.

8. A review of the information provided by a comparison of Oldsmobile's percentage of the market in the Omaha zone shows that McIntyre and O'Daniel failed to perform to zone average during any of the years examined (1980 to 1984).

9. Both McIntyre and O'Daniel failed to perform to national average during any of the referenced years.

10. The effectiveness of dealers is based on both sales and registrations in a community. With respect to each dealer, a determination of exactly how many Oldsmobiles are registered in the community is made, and this amount is compared to the

number of sales the respective dealer made. This ratio determines the effectiveness of the individual dealer.

11. Under this system, O'Daniel has not been rated effective for the past 5 years. McIntyre was rated effective once, in 1980.

12. Based upon the same rating system for all dealers, most of the dealers in the Omaha zone, other than O'Daniel and McIntyre, are rated effective.

II. "INVESTMENT NECESSARILY MADE AND OBLIGATIONS INCURRED BY OTHER FRANCHISEES OF THE SAME LINE-MAKE IN THAT COMMUNITY . . . ." § 60-1434(2).

1. There is no evidence in the record of McIntyre's investment.

2. The statute states "investment necessarily made." This means the investment that *must* be made by the existing franchisee in order to maintain the dealership up to the "guide" set by General Motors for its Oldsmobile dealers.

3. Bernard O'Daniel testified that he estimated the dealership investment to be $3 million. Specifically, however, he stated the following approximate value of his assets:

a. The initial land was purchased in 1963. The first 3 acres were purchased at a cost of $250,000. The original building was constructed at a cost of approximately $450,000;

b. O'Daniel added 2 acres 1 1/2 years later at a cost of approximately $125,000. At that time, after the acquisition of this additional property, O'Daniel was up to the "guide" set by General Motors for its Oldsmobile dealers.

c. O'Daniel purchased an additional 3 acres to the east, but this investment was incurred partially for O'Daniel's investment in a Honda franchise. This purchase was not required by Oldsmobile.

d. Four or five years ago O'Daniel spent approximately $400,000 on a new 30-bay body shop, with the approval of Oldsmobile. No objection was received by General Motors when Bernard O'Daniel told it he was planning to construct this body shop; however, this investment was not required by General Motors.

III. "PERMANENCY OF THE INVESTMENT." § 60-1434(3).

The statute does not specify whether the board is to consider the permanency of the investment of only the present dealers, or the investment of both the present dealers and the proposed dealer. Because the statute is unclear, little evidence was adduced on the permanency of the proposed investor, as the appellant presumed that the statute was referring only to the current dealers. We will, however, consider what little evidence was admitted on the issue of the permanency of the proposed investment.

1. O'Daniel has been a franchised Oldsmobile dealer since 1958, and has been located at 78th and Dodge Streets in Omaha, Nebraska, since the end of 1965. O'Daniel is also a Honda franchisee.

2. O'Daniel has a substantial permanent investment at its present location. The facilities and land are valued at over $1 million, as discussed above.

3. General Motors holds an option on the land proposed by Oldsmobile for the new dealership. The land is valued at $500,000.

4. Currey testified that the total investment in this new dealership will be in excess of $1.3 million.

IV. "EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AS A WHOLE IN THAT COMMUNITY." § 60-1434(4).

1. O'Daniel has been a franchised dealer of Oldsmobiles since 1958 and has remained at its current location since 1965.

2. The population of the Omaha area has increased 67 percent since 1950.

3. Generally, when populations increase, the needs of customers will increase.

4. The majority of the growth in the Omaha area is in the west and southwest areas of Omaha.

5. The majority of the population in Omaha is still within the O'Daniel AGSSA.

6. The proposed dealer is 7.7 miles to the west of O'Daniel and 17 miles to the west of McIntyre.

7. For McIntyre, only 25 percent of sales made are to customers more than 10 miles from the dealership.

8. For O'Daniel, only 25 percent of sales made are to

customers more than 6 miles from the dealership.

9. Oldsmobile is the third-largest-selling line-make in the industry.

10. Oldsmobile is represented less in the Omaha area than virtually all other line-makes except Volkswagen and Cadillac.

11. Buick and Mercury are two of the makes Oldsmobile directly competes with, and they are each represented by three dealers in the Omaha area.

V. "WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED." § 60-1434(5).

1. The establishment of a new dealership in the Omaha area would inject approximately $1.3 million into the Omaha economy.

2. Presumably, the existence of another Oldsmobile dealership would increase the availability of jobs in the Omaha community.

3. There was no evidence that the establishment of a new dealership would result in any loss of employment for O'Daniel employees.

4. Other line-makes in the Omaha area are each represented by at least three dealers, with the exception of Cadillac and Volkswagen.

5. Generally speaking, when competition is increased, lower prices and better service are a result of this increased competition.

6. Because most of the growth in the Omaha area is to the west, the establishment of a third dealer in the proposed area should result in greater convenience for members of the Omaha community.

VI. "WHETHER THE FRANCHISEES OF THE SAME LINE-MAKE IN THAT COMMUNITY ARE PROVIDING ADEQUATE CONSUMER CARE FOR THE MOTOR VEHICLE . . . SERVICE FACILITIES, EQUIPMENT, SUPPLY OF PARTS AND QUALIFIED SERVICE PERSONNEL." § 60-1434(6).

1. General Motors was not allowed to present evidence regarding the quality of customer care rendered by McIntyre. This nonreceipt of evidence was error, as the statute clearly

contemplates that the board will consider whether *all* the franchisees of the same line-make in the community are providing adequate consumer care. However, as we have no evidence on this issue, we can only consider O'Daniel.

2. Currey, the Omaha zone manager for the past 5-plus years, testified, "[O'Daniel] has been up and . . . has been down. I would say [O'Daniel's] service has been adequate."

The determination of whether good cause exists for the establishment of a new Oldsmobile dealership in the Omaha area is a difficult one. However, based on the foregoing analysis of the factors contained within § 60-1434, it is the opinion of this court that the decision of the district court must be reversed. General Motors has shown good cause to establish a new dealership, and we feel that the additional dealership is in the public interest.

The judgment of the district court affirming the findings of the Nebraska Motor Vehicle Industry Licensing Board is hereby reversed.

REVERSED.

CAPORALE, J., concurring.

Although I was not a member of the fractional unit of the court resolving this case and although I agree with the result, I must nonetheless object to the dictum which comments on the decisions other courts have reached concerning the constitutionality of similar statutes. The question of constitutionality simply is not present in this case. Indeed, had it been present, the case would have required consideration and decision by the court en banc. Neb. Const. art. V, § 2.

I strongly suspect that if franchisees not receiving the same protection as automobile franchisees nevertheless operate under market forces which are functionally the same as those under which automobile franchisees operate, there exists a very serious special legislation question under the provisions of Neb. Const. art. III, § 18.

AMERICAN HONDA FINANCE CORPORATION, APPELLANT, V. RONALD L. BENNETT AND SHIRLEY J. BENNETT, APPELLEES.

439 N.W.2d 459

Filed May 5, 1989. No. 87-611.

1. **Summary Judgment: Appeal and Error.** In reviewing a grant of summary judgment, the Supreme Court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **States: Statutes: Presumptions.** Where another state's law is unclear or undecided, the Supreme Court assumes its law to be the same as Nebraska's and applies Nebraska law to the dispute.
3. **Uniform Commercial Code: Guaranty: Notice: Words and Phrases.** A guarantor is a debtor entitled to receive notice under Neb. U.C.C. § 9-504(3) (Reissue 1980).
4. **Uniform Commercial Code: Security Interests: Notice: Guaranty.** Reasonable notice of the sale of collateral is a prerequisite to collection of a deficiency judgment against the debtor. To be reasonable, the notice must inform the guarantor of his potential liability for a deficiency on the sale of collateral after the principal debtor's default.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Bartholomew L. McLeay and Gregory W. Searson, of Kutak Rock & Campbell, for appellant.

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellees.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

RONIN, D.J., Retired.

American Honda Finance Corporation (AHFC) appeals a Dodge County District Court order granting summary judgment in favor of Ronald L. and Shirley J. Bennett. We affirm.

In reviewing a grant of summary judgment, this court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Five Points Bank v. White,* 231 Neb. 568, 437 N.W.2d 460 (1989).

On February 12, 1985, AHFC entered into a security agreement with Bennett's Gun & Cycle, Inc., a corporation in which the Bennetts serve as corporate officers. On April 1, 1985, the Bennetts executed and delivered to AHFC a "continuing personal guaranty," wherein they personally guaranteed payment of any indebtedness arising under the security agreement. As of August 19, 1986, Bennett's Gun & Cycle was in default under the security agreement, and AHFC filed a petition of replevin to recover the inventory in the possession of Bennett's Gun & Cycle. On September 11, 1986, AHFC repossessed the inventory held by Bennett's Gun & Cycle.

On October 10, 1986, AHFC mailed a notice of private sale to the Bennetts. The same day an identical notice was sent to Bennett's Gun & Cycle. The notices were sent in the same envelope to the same address, the only difference being the first line of the inside address. The notices stated:

> RE: Repossessed Motorcycles and Power Equipment
> Dear Ronald and Shirley Bennett:
>
> Pleae [sic] be advised that on or after 8:00 AM, on October 24, 1986, American Honda Finance Corporation will sell at private sale the collateral heretofore repossessed from you by American Honda Finance Corporation pursuant to the Security Agreement between you and American Honda Finance Corporation. Such collateral consist of Motorcycles and Power Equipment.

Both notices were signed by H.L. Stephens, manager of AHFC. The private sale was held on October 24, 1986.

On February 4, 1987, AHFC and Bennett's Gun & Cycle agreed a deficiency judgment could be entered against Bennett's Gun & Cycle in the amount of $29,089.77. AHFC and Bennett's Gun & Cycle further stipulated that AHFC had given "reasonable notification" of the private sale to Bennett's Gun & Cycle and that the private sale was conducted in a "commercially reasonable manner." The parties expressly agreed the stipulation as to "reasonable notification" would not be used and would not prejudice either AHFC or the Bennetts in this action.

Both parties filed motions for summary judgment. After a

hearing on both motions, the district court found the notice of private sale was ambiguous as a matter of law, and AHFC was barred from pursuing a deficiency judgment against the Bennetts. The court also found that there was no genuine issue of material fact and that the Bennetts were entitled to have the lawsuit against them dismissed. The court granted the Bennetts' motion for summary judgment and dismissed AHFC's petition. AHFC appeals.

AHFC's assignments of error can be summarized as claiming the trial court erred (1) in not applying California law, (2) in not finding the notice was sufficient under both California and Nebraska law, and (3) in not finding the Bennetts were estopped from asserting the deficiency of the notice.

AHFC first argues California law should have been applied to determine all aspects of the personal guaranty signed by the Bennetts. This claim is based on a provision in the guaranty which states: "This Guaranty shall be governed as to validity, interpretation effect and in all other respects, by the laws and decisions of the State of California."

Cal. Com. Code § 9504(3) (West Supp. 1989) provides in pertinent part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor . . . notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is to be made.

According to AHFC, this section differs from Nebraska law in two respects. First, AHFC argues a guarantor is not a debtor under California law. Second, AHFC claims the California statute does not require the reasonable notice.

In its brief, AHFC concedes there is a split of authority on whether a guarantor must receive notice, and the California Supreme Court has not addressed the issue. Three courts have found a guarantor is a "debtor" entitled to receive notice. *American Nat. Bank v. Perma-Tile Roof Co.*, 200 Cal. App. 3d 889, 246 Cal. Rptr. 381 (1988); *C.I.T. Corp. v. Anwright Corp.*, 191 Cal. App. 3d 1420, 237 Cal. Rptr. 108 (1987); *Connolly v. Bank of Sonoma County*, 184 Cal. App. 3d 1119, 229 Cal. Rptr.

396 (1986). Two earlier cases held guarantors are not debtors and therefore are not entitled to notice under this section. *Rutan v. Summit Sports, Inc.*, 173 Cal. App. 3d 965, 219 Cal. Rptr. 381 (1985); *United States, etc. v. Kurtz*, 525 F. Supp. 734 (E.D. Pa. 1981), *aff'd* 688 F.2d 827 (3d Cir. 1982), *cert. denied* 459 U.S. 991, 103 S. Ct. 347, 74 L. Ed. 2d 387, applying California law. The later courts found *Rutan* was based almost exclusively on *Kurtz*, which had subsequently been criticized within its own district in *Ford Motor Credit Co. v. Lototsky*, 549 F. Supp. 996 (E.D. Pa. 1982).

These cases illustrate that California law is unclear on whether a guarantor is entitled to notice. Further, no California court has determined what must be contained in a notice before it is valid. Where another state's law is unclear or undecided, we assume its law to be the same as ours and apply Nebraska's law to the dispute. 16 Am. Jur. 2d *Conflicts of Law* § 78 (1979). Therefore, the trial court did not err in applying Nebraska law.

Nebraska law is clear. A guarantor is a debtor entitled to receive notice under Neb. U.C.C. § 9-504(3) (Reissue 1980). *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983). Reasonable notice of the sale of collateral is a prerequisite to collection of a deficiency judgment against the debtor. *General Electric Credit Corp. v. Lewis, supra*; *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; *First Nat. Bank & Trust Co. v. Hughes, supra*. To be reasonable, the notice must inform the guarantor of his potential liability for a deficiency on the sale of collateral after the principal debtor's default. *General Electric Credit Corp. v. Lewis, supra*; *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; *First Nat. Bank & Trust Co. v. Hughes, supra*.

Separate notices were sent to the primary debtor and the guarantors; however, the notice to the Bennetts states it was sent "pursuant to the Security Agreement between you and American Honda Finance Corporation." The notice made no reference to the guaranty agreement signed by the Bennetts. The notice received by the Bennetts referred only to collateral in

the form of motorcycles and power equipment repossessed from "you." From the notice, it is clear the "you" referred to is Bennett's Gun & Cycle, not Ronald and Shirley Bennett. Nor does the notice give any indication that the Bennetts may be held liable for any deficiency which results from the sale. Therefore, this notice was deficient as a matter of law.

AHFC also claims the Bennetts should be estopped from raising the sufficiency of the notice because, as officers of the debtor corporation, they knew Bennett's Gun & Cycle would not be able to satisfy any deficiency which resulted from the private sale. We can find no authority in Nebraska law to support such a claim. Further, AHFC does not cite to any authority which supports its contention. Therefore, we find this assignment of error to be without merit.

For the foregoing reasons, the summary judgment granted by the district court is affirmed.

AFFIRMED.

DELORES I. STRONG, APPELLANT, V. DONALD STRONG, APPELLEE.
439 N.W.2d 90

Filed May 5, 1989. No. 87-637.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Mark A. Johnson, of The Law Offices of Robert M. Cook, for appellant.

David E. Copple, of Domina, Gerrard, Copple & Stratton, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

PER CURIAM.

The petitioner, Delores I. Strong, appeals the division of property and debts and the determination of alimony as

decreed by the trial court in this proceeding.

As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion in dividing the property and debts, and in awarding alimony. *Decker v. Decker*, 229 Neb. 347, 426 N.W.2d 533 (1988).

We determine that there was no abuse of discretion by the trial court with respect to the issues raised. Accordingly, the decree of the trial court is affirmed. The request of appellant for the allowance of attorney fees is denied.

We deem it appropriate to note that appellant requests this court to consider the effect of possible bankruptcy proceedings and results therefrom, with respect to the division of property and debts. No evidence with respect thereto was shown at trial, and we decline to enter into speculation with respect to the same.

AFFIRMED.

COMMERCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, APPELLEE, V. PAUL G. MATT, JR., ET AL., APPELLEES, ZENOWIJ REPICHOWSKYJ, APPELLANT.

439 N.W.2d 463

Filed May 5, 1989. No. 87-698.

1. **Judgments: Res Judicata.** Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
2. _____: _____. The judgment in a former action between the same parties is final as to every issue which could have been decided in that action.
3. **Trial: Appeal and Error.** The disposition of procedural motions is left to the discretion of the trial court, and absent a showing of an abuse of that discretion, this court will affirm the trial court's rulings regarding such motions.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

James R. Place and Alan M. Thelen, of Breeling, Welling & Place, for appellant.

Robert T. Cannella, of Fitzgerald & Brown, for appellee Commercial Federal.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

GRANT, J.

This is an appeal from an order of summary judgment entered in favor of the plaintiff-appellee, Commercial Federal Savings and Loan Association (Commercial), by the Douglas County District Court, and against the defendant-appellant, Zenowij Repichowskyj.

Beginning in 1976, appellant, a landscape architect, was retained by Community Development Consultant's Corporation (CDCC) to assist in CDCC's Lakefield development project in Alliance, Nebraska. On July 26, 1977, CDCC executed a $750,000 promissory note and a mortgage, securing this note, on the Alliance land. Commercial was the payee and mortgagee in these instruments. As additional security for the note, Commercial required, and obtained, the personal guaranties of the CDCC stockholders at that time: Steven K. Neff, Paul G. Matt III, Michael R. Duffek, and Norman G. Bahr.

In May of 1979, after providing services to CDCC over a 3-year period, appellant purchased the interest of Duffek and Bahr in CDCC for $28,000. In addition to his $28,000 payment, appellant was required to personally guarantee the Commercial loan in order to get Commercial's release of Duffek and Bahr as guarantors of the $750,000 note. On May 30, 1979, an agreement entitled "Release of Guarantors" was executed by Commercial, appellant, Neff, Paul Matt III, and Paul Matt, Jr., containing the following language:

> WHEREAS, it is the desire of Steven K. Neff, Paul G. Matt III to obtain the release of the guarantee insofar as same applies to Michael R. Duffek and Norman G. Bahr

and to substitute as new guarantors for such released guarantors Zenowij Repichowskyj and Paul G. Matt Jr.; and

WHEREAS, Commercial Federal Savings and Loan Association will only allow such release of guarantors upon the naming of such new guarantors;

NOW, THEREFORE, for and in consideration of mutual covenants herein contained it is agreed as follows:

1. . . . Duffek and . . . Bahr are hereby released of any . . . obligations . . . pursuant to the Guarantee and Agreement between Commercial . . . and Steven K. Neff, Paul G. Matt III, Michael E. [sic] Duffek and Norman G. Bahr dated July 26, 1977.

2. Zenowij Repichowkyj [sic] and Paul G. Matt Jr. are hereby substituted as guarantors . . . .

On the same date, a new guaranty of the $750,000 note was executed by appellant, Neff, Paul G. Matt, Jr., and Paul G. Matt III.

On October 1, 1982, Commercial filed an action in the Box Butte County District Court to foreclose the CDCC mortgage. All of the guarantors, including appellant herein, were made defendants in the foreclosure action. CDCC and the guarantors filed a single answer. On September 12, 1983, the Box Butte County District Court ordered the mortgage foreclosed, found the amount due and owing Commercial to be $480,886, and granted the foreclosure defendants a 20-day redemption period. On September 30, 1983, a 9-month stay of the order of sale was granted by the Box Butte County District Court, on "Defendants' request for stay."

The judgment was never satisfied. On August 14, 1985, the property was sold for $250, and on September 10, 1985, the sale was confirmed. No appeal was taken from these proceedings by any party.

On January 14, 1986, Commercial, after having obtained leave to withdraw the original note, filed an action in the Douglas County District Court against appellant, the two Matts, and Neff. This action sought judgment in the amount of $609,214, representing the deficiency plus interest, on the

guaranty executed in favor of Commercial by appellant and the other guarantors.

In his answer, filed July 10, 1986, appellant pled as affirmative defenses (1) a lack of consideration for his guaranty, (2) insufficient notice of the foreclosure sale, and (3) the invalidity of the foreclosure sale because the sale was not conducted in a commercially reasonable manner. On January 5, 1987, appellant filed his answer to Commercial's third amended petition, setting out the foregoing affirmative defenses plus a fourth, to wit: that Commercial failed to disclose the risks of executing the guaranty to appellant.

Two other defendant guarantors, the Matts, alleged in their separate answer, filed June 24, 1986, an affirmative defense that they had

> presented to Plaintiff a buyer . . . and that Defendants [Matts] and [Commercial] had an agreement whereby [the property] would be purchased by this buyer for . . . $150,000.00, and that after acceptance of [this] agreement by [Commercial], [Commercial] refused to honor this agreement and accept payment in this amount from [the proposed] buyer.

On April 7, 1987, Commercial filed a motion for summary judgment against appellant and the three other guarantors of the mortgage note. A hearing was held on this motion on May 8, 1987, in the Douglas County District Court. At this hearing, the court received in evidence, without objection, certified copies of the Box Butte County District Court foreclosure proceedings and certain other evidence, including appellant's deposition. On May 15, 1987, the Douglas County District Court granted Commercial's motion as to appellant.

After the judgment was granted, appellant filed a motion for leave to amend his answer to include the affirmative defense asserted by the Matts, and filed a separate motion for a new trial and to vacate the district court's judgment. These two motions were denied by the district court in an order issued on June 24, 1987.

In his appeal to this court the appellant assigns as error the actions of the district court (1) in granting summary judgment since (a) there was a lack of consideration for the guaranty, or at

least an issue of fact as to the same, and (b) the defenses asserted by other party defendants should have been considered defenses of appellant; and (2) in abusing its discretion by overruling his motions for leave to amend his answer and for a new trial and vacation of the judgment. We affirm.

Although we need not reach either parts (a) or (b) of appellant's first assignment, since, as we set out below, they are barred by the doctrine of res judicata, it is clear this assignment of error is without merit.

The release executed by appellant recited his guaranty as partial consideration for the release of Duffek and Bahr as guarantors. Appellant's deposition, received as evidence at the hearing on Commercial's motion for summary judgment, shows that he executed the guaranty as a condition of his CDCC stock purchase. There was ample consideration for appellant's execution of the personal guaranty.

As to appellant's assignment pertaining to the district court's denial of his motion for leave to amend his answer to include the defense asserted by the Matts, we note that the Matts' answer referred only to actions of the Matts, that appellant's motion to amend came at least 11 months after he had notice of the facts constituting the defense, and that he had filed two detailed answers without mentioning the defense set out in the Matts' answer. It was only after judgment had been rendered against him that appellant sought again to amend his answer.

It is not an abuse of discretion for a court to refuse to permit an amended answer presenting a new defense to be filed after a judgment has been entered against the requesting party, where the facts to be included in the amended answer were known at the time the original answer was filed, and no excuse is offered for the delay in making the application to amend. See, *Yunghans v. O'Toole*, 199 Neb. 317, 258 N.W.2d 810 (1977); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984); *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982). See, also, Neb. Rev. Stat. § 25-852 (Reissue 1985).

Regardless of the foregoing, appellant filed an answer in the foreclosure proceeding held in the Box Butte County District Court, and the facts which constitute the affirmative defenses

he set out in his answer in this case had accrued prior to the foreclosure decree and confirmation of sale entered by the Box Butte County District Court.

Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Kuhlman v. Cargile*, 206 Neb. 302, 292 N.W.2d 574 (1980); *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979).

The judgment in a former action is final as to every issue which could have been decided in that action. This rule of res judicata is grounded on public policy and the necessity to end litigation. *Farmers State Bank v. Germer,* 231 Neb. 572, 437 N.W.2d 463 (1989); *Caradori v. Hamilton,* 193 Neb. 500, 227 N.W.2d 850 (1975).

Appellant, as a guarantor of a mortgage debt, who was joined and who appeared as a party in a mortgage foreclosure action, cannot, after the decree and confirmation of sale of the mortgaged property have become final, challenge the amount of the indebtedness in a subsequent action for a deficiency judgment by asserting facts which allegedly occurred prior to the trial of the foreclosure action. Such an attack on the amount of the indebtedness and of the resulting sale deficiency is precluded by the foreclosure decree and confirmation of sale which have become final. *Walter E. Heller & Company v. Cox*, 343 F. Supp. 519 (S.D.N.Y. 1972), *aff'd* 486 F.2d 1398 (2d Cir. 1973), *cert. denied* 414 U.S. 827, 94 S. Ct. 46, 38 L. Ed. 2d 61 (1973). See, also, *Stover v. Tompkins*, 34 Neb. 465, 51 N.W. 1040 (1892).

Appellant's second assignment of error concerns the district court's denial of his motion to amend and motion for new trial and to vacate the order of summary judgment. These motions are procedural in nature. The disposition of procedural motions is left to the discretion of the trial court, and absent a showing of an abuse of that discretion, this court will affirm the trial court's rulings regarding such motions. See, *Bittner v.*

Miller, 226 Neb. 206, 410 N.W.2d 478 (1987); *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987).

The district court did not abuse its discretion in ruling on appellant's motions. The district court's decision granting summary judgment against the appellant is hereby affirmed.

AFFIRMED.

JOHN J. LOONEY AND JUDITH C. LOONEY, APPELLANTS, V. WILLIAM PICKERING AND MARY ANN PICKERING, DOING BUSINESS AS MAR ENTERPRISES, APPELLEES.

439 N.W.2d 467

Filed May 5, 1989. No. 87-737.

1. **Motions to Dismiss.** In considering a motion to dismiss following trial, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which reasonably can be drawn from the evidence, and if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
2. **Motor Vehicles: Negligence.** The negligence of the family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own property damage.
3. _____: _____. When a driver cannot stop or turn aside in time to avoid a collision after a danger becomes apparent to him, generally, he is negligent as a matter of law.
4. **Negligence: Proximate Cause: Words and Phrases.** In negligence law, an efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.
5. **Negligence: Proximate Cause: Tort-feasors: Liability: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and injury. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
6. **Highways: Negligence: Proximate Cause.** Where a party creates an obstruction upon a highway and fails to use due care to warn others of its danger, his or her negligence may be a proximate cause of the injuries to another.

7. **Negligence: Proximate Cause.** The doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury.
8. **Highways: Negligence: Words and Phrases.** A failure to warn the traveling public of an obstruction placed on a highway by a person in a manner such as to constitute negligence is continuing negligence as distinguished from a condition.
9. **Negligence: Proximate Cause.** The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, generally is a question of fact, rather than a question of law.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded with directions.

Jeffrey A. Silver, of Silver and Wieland, for appellants.

John W. Iliff, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

HASTINGS, C.J.

The plaintiffs-appellants, John J. and Judith C. Looney, brought their action in the county court for Douglas County, alleging negligence by the defendants-appellees, William and Mary Ann Pickering, doing business as Mar Enterprises. The county court dismissed the plaintiffs' petition at the close of the plaintiffs' case. On appeal to the district court for Douglas County, the dismissal was affirmed.

> In considering a directed verdict or motion to dismiss at trial, this court has held: " '. . . [T]he trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. . . . Moreover, in considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any

> evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.' "

Delgado v. Inryco, Inc., 230 Neb. 662, 666, 433 N.W.2d 179, 182-83 (1988), quoting *Topil v. Hub Hall Co.*, 230 Neb. 151, 430 N.W.2d 306 (1988), and *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987). We reverse and remand with directions.

Plaintiffs were the owners of a family-purpose automobile. On July 10, 1986, the plaintiffs' son John was driving that automobile south on 90th Street in Omaha in the area between Pacific and Center Streets. At that point, 90th Street is a four-lane paved street running north and south, and no-parking signs are posted on the west side of the street. The plaintiffs' son was proceeding in the westernmost or right-hand lane. He was following an Omega automobile, which in turn was behind a van. Traffic was moving at a speed of between 30 and 35 miles per hour.

The plaintiffs' son observed first the van and then the Omega move suddenly from the outside lane to the inside lane. He looked in his rearview mirror to see if he could also change lanes. He observed another automobile coming alongside his car on the lefthand side, and, in his opinion, he could not safely change lanes. He applied his brakes, but was unable to avoid colliding with the rear end of the defendants' truck and trailer, which were parked in the curb lane. Besides being parked in a "no parking" zone, neither the truck nor the trailer was equipped with emergency flashers, nor were there any other signs, flags, or flares to warn approaching traffic that the truck and trailer were stopped.

In dismissing plaintiffs' petition, the trial court stated: "Mr. Looney, the Court finds that the negligence of the defendant herein was not the proximate cause of the accident as your son was guilty of negligence more than slight in the thing." From this statement, it is difficult to determine if the trial court based its decision on the theory that the contributory negligence of the plaintiffs' driver was imputed to the plaintiffs and was sufficient as a matter of law to bar recovery, or whether the court found that the negligence of plaintiffs' son was the *sole* proximate cause of the accident.

Regarding the imputation of a family-purpose car's driver's negligence to the owner of the vehicle, the most recent Nebraska case on this point is *Paprocki v. Stopak*, 213 Neb. 523, 330 N.W.2d 475 (1983). This court stated at 525-26, 330 N.W.2d at 476-77:

> [T]he negligence of the family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. See *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955).
>
> The underlying purpose of the family-purpose doctrine is to provide financial responsibility for the negligent acts of family members which cause damage to third parties. Such a purpose is not present when the owner of a family-purpose car sues to recover his own damages caused, or jointly caused, by the negligence of third parties. See 2 Harper & James, Law of Torts § 23.6 (1956).

In *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955), the plaintiff owned the automobile which was being driven by her husband when it was involved in a collision with the defendants' vehicle. The jury returned a verdict for the plaintiff for her injuries and damages to her automobile. On appeal, the defendants contended that the trial court erred in not instructing the jury on the contributory negligence of the plaintiff's husband, which it was argued was imputed to the plaintiff.

The *Bartek* court rejected that position, stating:

> The family purpose doctrine does not have for its objective the purpose of defeating a claim for damages by a guest by imputing the negligence of a driver to such guest but rather to impose upon the owner of a car being used for family purposes the responsibility for its operation as a matter of public policy.

Id. at 802, 71 N.W.2d at 473.

Bartek is annotated at Annot., 8 A.L.R.3d 1191 (1966), where additional cases may be found supporting the Nebraska rule. Also, cases are reported there which have applied the so-called "both ways" test, concluding that if the negligence of the driver is imputed to the owner in a suit by third parties, it is

also applicable in suits by the owner against the third party. At common law, of course, ordinarily a bailor would not be liable for the negligence of the bailee, nor would the negligence of the latter be imputed to the bailor.

In Restatement (Second) of Torts § 485, comment *d.* at 542-43 (1965), the following may be found:

> For example, there are statutes which make the owner of an automobile liable as a defendant for any harm done to others by the negligence of any one driving it with the consent of the owner. If the purpose of such a statute is found to be to make the owner responsible in all respects for the negligence of the driver, it may be construed to impute the negligence of the driver to the owner to bar his recovery for harm to the automobile. On the other hand, if the purpose of the statute is found to be merely to give greater opportunity for recovery to third persons injured by the negligent operation of automobiles, by affording an action against a financially responsible defendant, it may be construed to have no such effect in imputing the negligence to the owner to bar his own recovery.

Although the foregoing language was not directly related to the family-purpose doctrine, its reasoning certainly would be applicable in those jurisdictions where the doctrine was imposed by statute. There is no logical reason why the same cannot also be said of states like our own in which the doctrine was adopted by judicial fiat.

The family-purpose doctrine in Nebraska apparently originated in the case of *Stevens v. Luther*, 105 Neb. 184, 186, 180 N.W. 87, 88 (1920), wherein this court stated:

> The question [liability of father for negligence of daughter driver] presented by defendant is new in this jurisdiction. But by the weight of authority, in the jurisdictions where the question has been determined, the owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept.

It is therefore apparent that the rule developed in this state had

for its purpose not the making of the owner "responsible in all respects," but, rather, the providing of financial responsibility to third persons injured through the negligence of financially irresponsible automobile drivers. As stated in *Christensen v. Hennepin Transportation Co. Inc.*, 215 Minn. 394, 413, 10 N.W.2d 406, 417 (1943), "The very reason for holding the consenting owner liable for negligence of the operator of his automobile, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages" done to his car by a negligent third party.

The defendants concede that the rule in Nebraska does not impute the contributory negligence of a family-purpose driver to the owner of an automobile in an action by the latter to recover his or her damages caused by the negligence of a third party. However, they argue that their action in parking the truck and trailer was not a proximate cause of the accident. Rather, it is insisted, they only created a condition, and the negligence of plaintiffs' son was *the* proximate cause of the accident.

There was evidence from which it could be found that plaintiffs' driver was negligent as a matter of law. In *Vrba v. Kelly*, 198 Neb. 723, 725, 255 N.W.2d 269, 270 (1977), this court said: "When a driver cannot stop or turn aside in time to avoid a collision after a danger becomes apparent to him, he is negligent as a matter of law." Therefore, we must examine the actions of the defendants to determine whether they were guilty of any negligence proximately causing the collision, or whether the plaintiffs' driver's negligence was the *sole* proximate cause.

This court recently addressed intervening causes in *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). Quoting from *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988), the court defined intervening cause in this way: " 'In negligence law, an efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between original conduct and the injury. . . .' " *Union Pacific, supra* at 174, 425 N.W.2d at 882. Quoting from 4 F. Harper, F. James & O. Gray, The Law of Torts § 20.5 (2d ed. 1986), the court continued:

"If the likelihood of the intervening act was one of the

> hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences; otherwise he will generally not be, provided, of course, that the intervening force is a cause of the injury."

Union Pacific, supra at 175, 425 N.W.2d at 882.

This court also discussed efficient intervening causes in *Delaware v. Valls*, 226 Neb. 140, 144, 409 N.W.2d 621, 624 (1987):

> We have defined an efficient intervening cause as a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. [Citation omitted.] . . . The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. [Citation omitted.]

Thus, foreseeability is an important determinant of whether the defendants are relieved of liability for their own negligence by the intervening negligence of another. Accordingly, in order to uphold the court's dismissal of the plaintiffs' petition in this case, we must find that when the facts are viewed most favorably toward the plaintiffs, only one conclusion can be drawn: that plaintiffs' son's negligence was not foreseeable by the defendants. We cannot make that finding as a matter of law.

In *Johnson v. Metropolitan Utilities Dist.*, 176 Neb. 276, 125 N.W.2d 708 (1964), the defendant had parked its bulldozer 2 feet into the street. Glare from the sun, it was claimed, interfered with the plaintiff's driver's vision, and he hit the bulldozer. The passenger sued, and the court granted the defendant's motion for summary judgment. On appeal, the issue was whether the defendant's negligence was a proximate cause of the plaintiff's injuries. The defendant contended the bulldozer merely constituted a condition.

> There is . . . a group of cases in which this court has held that where a party creates an obstruction upon a highway and fails to use due care to warn others of its danger, his negligence may be a proximate cause of the injuries to another. These cases generally have involved situations where the object or obstruction in the highway was not

> readily visible or there was something which interfered with the vision of the persons approaching it. . . .
>
> . . . [T]he doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved . . . by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury.

Id. at 280-81, 125 N.W.2d at 711. The court concluded that the defendant's negligence presented an issue of fact, and reversed the summary judgment.

The plaintiffs in *Drawbridge and Misterek v. Douglas County*, 209 Neb. 806, 311 N.W.2d 898 (1981), were passengers in a vehicle which collided with a disabled car which was parked partly on the pavement and partly on the shoulder. The plaintiffs sued the county, alleging the patrol officer from the sheriff's department had failed to adequately warn oncoming traffic of the parked car's presence. The court held, "A failure to so warn the traveling public is continuing negligence as distinguished from a condition. . . . The trial court could find, under the facts and circumstances in this case, that he [the officer] failed to use due care to warn approaching traffic . . . ." *Id.* at 810, 311 N.W.2d at 902.

In *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981), the plaintiff sued the Nebraska Public Power District (NPPD) when a truck, whose driver was unable to see the plaintiff's vehicle because of dense smoke emanating from weeds being burned by NPPD employees, ran into her car. NPPD's defense was that the smoke merely created a condition. In reversing a judgment of the district court, which had granted NPPD's motion for summary judgment, this court said:

> "The rule adopted in this state is: '. . . when one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway. The negligence in such a case consists of having placed an

> obstruction upon the street, and leaving it in such a manner as will be dangerous to others using the street.' . . ."

Id. at 65, 306 N.W.2d at 170. The court went on to explain that a finding of negligence on the part of the plaintiff or the truckdriver would not necessarily relieve NPPD of liability.

> "Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor. . . . The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen. The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law."

Id. at 67, 306 N.W.2d at 171, quoting *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973).

This court concluded that the question of whether NPPD placed a dangerous obstruction on the highway, thereby failing to use ordinary care to prevent injury to others, as well as the question of whether that negligence was a continuing and substantial factor in producing the accident so as to be a proximate cause of the injury, was a question of fact which should have been submitted to the jury.

The question of negligence on the part of plaintiffs' driver in this case presented a question of fact. Whether the acts of the defendants were negligent was also one for the trier of fact, as was the determination of whether plaintiffs' driver's negligence was a sufficient intervening cause so as to make his negligence the *sole* proximate cause of the accident. As we read the record, these determinations were not made by the trial court.

The judgment of the district court is reversed and the cause remanded with directions to the district court to remand the cause to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

MARLIN FRENZEN, APPELLANT, V. EUGENE E. TAYLOR AND PATRICIA A. TAYLOR, HUSBAND AND WIFE, APPELLEES, RODNEY WETOVICK, INTERVENOR-APPELLEE.

439 N.W.2d 473

Filed May 5, 1989. No. 87-771.

1. **Specific Performance: Real Estate: Contracts.** Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
2. **Specific Performance: Real Estate.** Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance.
3. **Contracts: Parol Agreement.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration, and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach of the contract.
4. **Contracts: Real Estate: Time.** In the ordinary contract for the sale of real estate, time is not of the essence unless provided in the agreement itself or clearly manifested by the agreement construed in the light of surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time.
5. **Contracts: Time.** When a contract expressly provides for a specific closing date, performance is normally due within a reasonable time after the date mentioned.
6. **Contracts.** When a contractual duty is subject to the occurrence of a specific contingency or event as a condition, the condition must occur before a party is obligated to perform the contractual duty unless nonoccurrence is excused.
7. **Contracts: Intent.** In attempting to ascertain the meaning of ambiguous terms of a contract, a court must determine the actual intent of the contracting parties, considering facts and circumstances which motivated each party to enter the contract, and the nature and subject matter of the contract.

Appeal from the District Court for Nance County: JOHN M. BROWER, Judge. Affirmed.

John M. Gerrard and Kathleen Koenig Rockey, of Domina, Gerrard, Copple & Stratton, P.C., for appellant.

Donald R. Treadway, of Treadway & Bird, P.C., for appellees.

Gerald M. Stilmock, of Tessendorf, Milbourn & Fehringer, P.C., for intervenor-appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

SHANAHAN, J.

Marlin Frenzen filed a petition in the district court for Nance County, seeking specific performance of a contract with Eugene E. and Patricia A. Taylor for purchase of Taylors' farm. Rodney Wetovick intervened in the suit, also seeking specific performance of a contract with Taylors for the purchase of their farm. The district court denied equity relief to Frenzen and granted specific performance to Wetovick. Frenzen appeals.

STANDARD OF REVIEW

An action for specific performance of a contract is an equity action. *Brown v. Knox*, 219 Neb. 189, 361 N.W.2d 540 (1985).

> In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Hughes v. Enterprise Irrigation Dist., 226 Neb. 230, 234, 410 N.W.2d 494, 497 (1987). See, also, Neb. Rev. Stat. § 25-1925 (Reissue 1985). "An action for specific performance is governed by the elements, conditions, and incidents which control the administration of all equitable remedies." *Mohrlang v. Draper*, 219 Neb. 630, 633, 365 N.W.2d 443, 446 (1985).

AGREEMENTS FOR PURCHASE OF TAYLORS' FARM

Sometime in September 1986, Taylors decided to list for sale certain farmland owned by them in Nance County. Immediately after the "For Sale" sign went up on the Taylors' property, Frenzen, who had lived on and farmed the land as a tenant for 25 years, expressed an interest in buying the land. Richard Wallick, real estate agent for the Taylors, recalled Frenzen's expressing his belief that the property was worth no more than $70,000, which was substantially less than Taylors'

initial asking price. Wallick's efforts to sell the property continued, as he combed the area for potential buyers for Taylors' farm.

In October of 1986, Wetovick indicated his interest in buying the Taylor farm. Wallick showed the farm to Wetovick, who offered $85,000 for the Taylor farm in early December. Taylors rejected Wetovick's offer, and negotiations continued between Taylors and Wetovick until they agreed on a sale price of $90,000 for the farm.

Taylors and Wetovick entered a purchase agreement, dated December 19, 1986, containing two specific contingencies: Taylors' enrolling at least 75 acres of their farm in the federal government's Conservation Reserve Program (CRP), and an appraisal by a licensed appraiser, setting the farm's value at a figure equal to or exceeding the purchase price offered by Wetovick. Both contingencies were for Wetovick's benefit alone. Wetovick believed that the appraisal was necessary to obtain sale financing from his bank, and CRP land would ensure a steady income from the farm. Consequently, when he signed the purchase agreement, Wetovick understood that he could waive either or both of these contingencies. The contract also stated that Taylors "[agree] to furnish without delay, [an] abstract of title certified to date of sale."

The Taylor-Wetovick contract specified March 1, 1987, as the closing date for the sale. Later, Taylors, for "[n]o particular reason," expressed their desire to advance the closing date to February 17, 1987. As Eugene Taylor expressed: "I had an investment opportunity on the 20th [of February], and I thought if I could have the money by that time I might take advantage of it." The closing date for February 17 was "only a convenience," and "from day one," Taylors intended to close the sale whenever possible.

Wallick then began to inquire into the feasibility of enrolling acres in the CRP. Sometime in January 1987, Wallick checked with local soil conservation offices and was informed that, as a condition of a sale, enrollment of the Taylor farm in the CRP would constitute a fraud on the federal government. At the end of January, Wallick received a phone call from Frenzen, who asked "[i]f everything was going to happen" regarding the sale to Wetovick. Frenzen's wife, Judy, worked in the Nance County

soil conservation office and had become aware of the CRP contingency in the Taylor-Wetovick contract. At this point, Wallick was "a hundred percent convinced" that the property could not be enrolled in the CRP and that, without a waiver of the contingencies by Wetovick, the Taylor-Wetovick sale would not be consummated. At that time, Frenzen expressed further interest in buying the land with financial backing by his relatives in California.

On February 6, Frenzen and Taylors entered a purchase agreement which covered the same land involved in the Taylor-Wetovick sale and which contained a purchase price of $90,000. The Frenzen-Taylor agreement was "contingent upon the Purchase Agreement dated December 19, 1986 between the Seller and Rodney Wetovick not being consumated [sic] on or before February 17, 1987 as set forth in said agreement." Wallick, the realtor, told Frenzen that the contingencies in the Taylor-Wetovick agreement could be waived by Wetovick. The Frenzen-Taylor agreement required that Taylors furnish an abstract of title, showing Taylors' merchantable title for the farm, and specified February 20, 1987, as the date for closing the sale. Frenzen made a downpayment of $10,000.

On February 6, Taylors discovered that one of the three abstracts for their farm was missing and decided that title insurance would be needed to close the sale with Wetovick.

On or about February 13, 1987, Wallick told Wetovick about the existence of a second purchase agreement for the Taylor farm. There is a conflict in testimony regarding the extent of information conveyed to Wetovick concerning the additional purchase agreement. Wetovick testified that Wallick never told him about the terms of the contract, including the name of the other prospective purchaser or the fact that the other contract was contingent on Wetovick's failure to close the sale by February 17. Wallick, however, testified that he was "reasonably sure" that he told Wetovick that the Taylor-Wetovick sale had to be closed "on or about February 17th" or Frenzen's contract would become operative in the sale of Taylors' farm.

Near the time Wallick informed Wetovick about the other purchase agreement, Wallick told Wetovick that the CRP

contingency could not be accomplished. After learning that CRP enrollment would be impossible, Wetovick orally offered to pay Taylors $85,000 for their farm without CRP acres. However, Wallick informed Wetovick that this offer was unacceptable in view of Frenzen's offer of $90,000 without any contingencies.

Wetovick did not agree to waive the contingencies until February 16, 1987, when Wetovick knew that the sale would not be closed on February 17 on account of the delay in obtaining title insurance. Wallick testified that Taylors did not obtain title insurance before February 16 because Wetovick had not waived the CRP contingency. In Wallick's words, "We didn't order a title insurance policy for Rod [Wetovick] until we knew that he owned the farm. Until those contingencies were dropped we couldn't order title insurance. If we ordered it, we would have paid for it, and we weren't about to pay for it."

February 17 passed, and the Taylor-Wetovick sale was not closed. On February 18 and 20, Wetovick and Taylors signed an "Addendum" to their purchase agreement, reducing to writing Wetovick's previous oral waiver of the two contingencies contained in the original contract. The addendum also changed the closing date stated in the original purchase agreement to "as soon as the paperwork can be completed." Wallick testified that the parties had set a tentative closing date of February 28, 1987.

Also on February 18, Frenzen talked to Wallick regarding purchase of Taylors' farm. Wallick told Frenzen that Wetovick had waived the contract contingencies and that the sale to Wetovick would be completed. Frenzen testified that he was "overwhelmed" because, at midnight on February 17, he thought he "had the farm bought." Frenzen also testified that he offered to pay the balance of the purchase price on February 18 and 19, but that Wallick said Taylors would not sell the farm to Frenzen in view of the contract with Wetovick.

A policy of title insurance was not issued and mailed to Taylors' attorney until February 25, 1987. On February 26, Frenzen's attorney wrote Wallick and stated Frenzen's contract claim to the Taylor farm. As a result of the correspondence, the Taylor-Wetovick sale was not closed on February 28 as scheduled. Subsequently, Wetovick and Frenzen each filed a

specific performance suit against Taylors.

COMPETING CLAIMS FOR SPECIFIC PERFORMANCE

> When land or any interest therein is the subject matter of a contract, the power of a court of equity to grant specific performance is beyond question. [Citation omitted.] We have held that specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate. [Citation omitted.] Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance.

Mohrlang v. Draper, 219 Neb. 630, 633, 365 N.W.2d 443, 446 (1985).

Wetovick's contract to purchase the Taylor farm was valid and remained in effect after Wetovick's oral waiver of contingencies on February 16. When Wetovick waived the contingencies in his contract on February 16, the contract for the sale of the Taylor farm had not been breached. At that point, the parties could validly modify their initial agreement, waiving contingencies and altering the initial closing date. "A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof." *Pearce v. ELIC Corp.*, 213 Neb. 193, 201, 329 N.W.2d 74, 79 (1982); *Cole v. Hickey*, 215 Neb. 728, 340 N.W.2d 418 (1983).

Even in the absence of a change in the closing date, the Taylor-Wetovick contract remained effective on February 18, 1 day after the closing date specified in the contract. In the ordinary contract for the sale of real estate, time is not of the essence unless provided in the agreement itself or clearly manifested by the agreement construed in the light of surrounding circumstances. Where time is not of the essence,

performance must be within a reasonable time. *Dowd Grain Co., Inc. v. Pflug*, 193 Neb. 483, 227 N.W.2d 610 (1975). When a contract expressly provides for a specific closing date, performance is normally due within a reasonable time after the date mentioned. In *Tedco Development Corp. v. Overland Hills, Inc.*, 200 Neb. 748, 266 N.W.2d 56 (1978), this court faced a factual situation similar to the present case, that is, competing claims for specific performance. Regarding the time for performance of the first purchaser's contract, we expressed:

> The contract provided for a closing date of February 25, 1977. In 71 Am. Jur. 2d, Specific Performance, § 63, p. 91, it is stated: " * * * in the ordinary cases of sales of realty, the general object being to make a sale for an agreed sum, the time of payment is regarded in equity as formal, and as meaning only that the purchase shall be completed *within a reasonable time,* and substantially according to the contract, *regard being had to all the circumstances.*"

(Emphasis in original.) 200 Neb. at 755, 266 N.W.2d at 60. See, also, A. Corbin, Corbin on Contracts § 716 at 677 (one vol. ed. 1952) ("[T]he fact that a specific time is fixed for payment or for conveyance does not make 'time of the essence' . . . .").

The Taylor-Wetovick agreement did not contain a clause expressly stating or language otherwise indicating that time was of the essence in the sale. Frenzen relies primarily on the change in the closing date, initiated by Taylors, in arguing that the circumstances show that Taylors intended that time was of the essence. We disagree. Since closing on a specific date was not crucial for the parties in the Taylor-Wetovick contract, Taylors changed the closing date as a matter of convenience. As Eugene Taylor testified, from the outset of the Taylor-Wetovick transaction, he wanted to close the deal "whenever [it] was possible."

Frenzen devotes much of his brief to an argument concerning time as a factor in the Frenzen-Taylor agreement. Frenzen's argument misconstrues the issues presented by this appeal. Wetovick's right to specific performance is not restricted by a subsequent contract to which he is not a party. Wetovick's right to specific performance extended beyond February 17, 1987, as the result of his subsisting contract with

Taylors notwithstanding the passage of February 17 without a closing of the sale. Wetovick is entitled to specific performance of his contract with Taylors.

Frenzen also claims an independent right to specific performance of his contract. Frenzen's right to purchase the Taylor farm, however, was subject to the condition precedent that Wetovick's deal not close "on or before February 17, 1987 *as set forth in said agreement*." (Emphasis supplied.) When a contractual duty is subject to the occurrence of a specific contingency or event as a condition, the condition must occur before a party is obligated to perform the contractual duty unless nonoccurrence is excused. See *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987). Since time was not of the essence in the Taylor-Wetovick contract, the terms of the contract allowed a closing after February 17. Thus, the language in the Frenzen-Taylor contract actually reflects a misperception of the provisions in the Taylor-Wetovick contract. The language in the first part of the contingency expressed in Frenzen's contract, "on or before February 17, 1987," is inconsistent with the language in the second part of the contractual contingency, "as set forth in said agreement." When read as a whole, the language of the contingency expressed in the Frenzen-Taylor contract is susceptible to more than one reasonable interpretation and, therefore, ambiguous. See *American Sec. Servs. v. Vodra,* 222 Neb. 480, 385 N.W.2d 73 (1986). In attempting to ascertain the meaning of ambiguous terms of a contract, a court must determine the actual intent of the contracting parties, considering facts and circumstances which motivated each party to enter the contract, and the nature and subject matter of the contract. *Lauritzen v. Davis,* 214 Neb. 547, 335 N.W.2d 520 (1983); *Lone Oak Farm Corp. v. Riverside Fertilizer,* 229 Neb. 548, 428 N.W.2d 175 (1988).

When he signed the contract, Frenzen was informed that Wetovick was free to waive the contractual contingencies for purchase of the Taylor farm. Consequently, Frenzen knew that the Taylor-Wetovick sale might be consummated despite the impossibility of CRP enrollment. We find that all parties understood that Frenzen's contract was a "backup" contract and would operate only if the Wetovick sale fell through, an

event which never occurred. Furthermore, Frenzen's contract is subject to the Taylor-Wetovick sale's not closing "as set forth in [the Taylor-Wetovick] agreement." As we have already noted, Wetovick's contract allowed closing beyond February 17, the closing date designated in the Taylor-Wetovick contract. Taylors and Wetovick, however, were prepared to close their transaction soon after February 17, but refrained from closing in view of Frenzen's claim. Thus, we conclude that Frenzen and Taylors did not intend that their contract would become operative unless the Taylor-Wetovick sale was not closed on February 17, or within a reasonable time after February 17. But for Frenzen's letter precluding the closing of the Taylor-Wetovick sale, Wetovick undoubtedly would have completed purchase of the Taylor farm. Consequently, the condition precedent to enforcement of Frenzen's right to purchase the farm never occurred. Therefore, Frenzen is not entitled to specific performance of his agreement with Taylors. However, Wetovick is entitled to specific performance of his contract with Taylors. For that reason, the decision of the district court is affirmed.

AFFIRMED.

H.L. JELSMA AND TOMMY JELSMA, DOING BUSINESS AS SPA, INC., APPELLEES, V. COLONIAL PENN INSURANCE CO., APPELLANT.

439 N.W.2d 479

Filed May 5, 1989. No. 87-839.

1. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both.
2. _____. Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
3. **Declaratory Judgments: Appeal and Error.** Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong.
4. **Attorney Fees: Insurance.** The statute providing for an award of attorney fees in an action on a policy of insurance authorizes the assessment of attorney fees, as costs, only when judgment is rendered upon a policy of insurance. The liability

of the insurer, surety, or guarantor on its agreement must first be determined and adjudged.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Hal Bauer, of Bauer, Galter & O'Brien, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is a companion case to *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). Except as otherwise declared herein, the facts are substantially the same in each case. Colonial Penn Insurance Co. has appealed from a judgment of the district court which declared that the attempted cancellation of the insurance policy which it had issued to H.L. and Tommy Jelsma was not effective and that the policy was in effect on July 29, 1986, the date of the Jelsmas' loss. We affirm.

The errors assigned by Colonial Penn were substantially as follows: The trial court erred in (1) holding that the cancellation of the policy was ineffective even though technical imperfections present in the notice of cancellation did not adversely affect the Jelsmas; (2) holding that the facts did not establish acquiescence of the Jelsmas in the cancellation of the policy; and (3) failing to hold that a refund by credit and debit on a commercial account satisfied the requirement of refund to an insured, particularly when the refund was used to pay for substitute insurance.

In *Jelsma v. Scottsdale Ins. Co.*, we answered adversely to the contentions of the insurance company's practically identical assignments of error, i.e., that the court erred in finding that cancellation was not in accordance with the provisions of the policy, that the court erred in failing to find that the return of the unearned premium to Alexander & Alexander constituted a return of the unearned premium to the insureds, and that the court erred in failing to find that the Jelsmas' conduct after

receiving the notice of cancellation constituted a waiver of any breach of the insurance contract by the insurer.

The only "new twist" to the insurer's claim in this case is that it argues that the Jelsmas' acquiescence in the cancellation is established by the fact that they obtained a short-term insurance policy from First State Insurance to replace the canceled Colonial Penn policy and used the refund of the unearned premium to pay for the substitute policy. See, *McRae v. Mercury Ins. Co.*, 126 Neb. 469, 253 N.W. 645 (1934) (acquiescence in cancellation notices will operate to cancel policy and will work an estoppel to assert that the policy is still in force); *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936) (cancellation of policy is ratified by insured when insured accepts the benefit of the unearned premium upon the former policy before loss and with knowledge of all facts).

However, not only is there no evidence in the record as to when Colonial Penn returned the Jelsmas' unearned premium to Alexander & Alexander, the agent, there is no evidence in the record to support a conclusion that the unearned premium from the Colonial Penn policy was used to pay for the First State policy. Furthermore, two other policies covering the Royal Grove, the Jelsmas' property, were canceled at about the same time the cancellation of the Colonial Penn policy was to take effect. Although Colonial Penn emphasizes the fact that the coverage of the First State policy commenced on the same day cancellation of the Colonial Penn policy was to take effect, given the lack of evidence in the record regarding the First State policy, it would be pure speculation for this court to find that the First State policy was intended to replace the Colonial Penn policy or that the First State policy was even intended to replace any canceled coverage. The only evidence adduced at trial was to the effect that Alexander & Alexander obtained bids for replacement coverage, which were declined by the Jelsmas because the premiums were too high.

Whether the insureds acquiesced in the cancellation is a question of fact. The trial court specifically found that "[t]he facts presented to the court do not establish that plaintiff acquiesced in the cancellation or waived his rights to assert that

the cancellation was ineffective." A suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both. *Jelsma v. Scottsdale Ins. Co., supra.* Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. *Jelsma v. Scottsdale Ins. Co., supra.* Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Jelsma v. Scottsdale Ins. Co., supra.*

We cannot say that the trial court was clearly wrong in this determination.

Appellees request an award of an attorney fee pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988). Section 44-359 provides:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . against any company . . . doing business in the state, the court, upon rendering a judgment against such company . . . shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings . . . .

Appellees are not entitled to an award of an attorney fee because they do not fall within § 44-359. This action was not an action upon the policy, it was an action to determine whether the policy was still in effect. As this court said in *Lundt v. Insurance Co. of North America*, 184 Neb. 208, 210, 166 N.W.2d 404, 405 (1969), "The statute authorizes the assessment of attorney's fees, as costs, *only when judgment is rendered* upon a policy of insurance. The liability of the insurer, surety, or guarantor on its agreement must first be determined and adjudged." (Emphasis in original.) See, also, *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973) (action for declaratory judgment for construction of policy to determine coverage); *State Farm Mut. Auto. Ins. Co. v. Selders*, 189 Neb. 334, 202 N.W.2d 625 (1972) (action for declaratory judgment to determine coverage); *Workman v.*

Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N.W.2d 8 (1972) (action for declaratory judgment to determine coverage). The liability of Colonial Penn has not yet been determined; the only issue having been determined is that the policy was still in effect on the date of loss.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DAYTON O. RASMUSSEN, JR., RESPONDENT.

439 N.W.2d 481

Filed May 5, 1989. No. 88-234.

1. **Disciplinary Proceedings.** The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.
2. _____. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.

Original action. Judgment of disbarment.

Alison L. Larson, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an original disciplinary proceeding against respondent, Dayton O. Rasmussen, Jr., of Omaha, Nebraska, who was formally charged with (1) violating his oath of office as provided in Neb. Rev. Stat. § 7-104 (Reissue 1987), and (2) violating provisions of the Code of Professional Responsibility adopted by this court, namely: "DR 1-102 Misconduct. (A) A

lawyer shall not: (1) Violate a Disciplinary Rule," and "DR 6-101 Failing to Act Competently. (A) A lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him."

Respondent failed to appear at the referee's hearing on June 30, 1988. The referee recommended a reprimand and other sanctions. We enter a judgment of disbarment.

Generally, the facts and issues concern the attorney-client relationship of respondent and his client, Betty Seher, of Omaha, Nebraska, and particularly respondent's inattention to Seher's interests in a pending lawsuit. Respondent was admitted to the practice of law on February 26, 1948.

The following uncontroverted facts were developed in the proceedings before both the Committee on Inquiry of the Second Disciplinary District and the referee. On August 22, 1984, respondent filed suit on behalf of Seher in the U.S. District Court for the District of Nebraska against Seher's former employer, alleging age and sex discrimination, retaliation, and breach of contract. On August 1, 1986, Seher wrote to the Counsel for Discipline of the Nebraska State Bar Association, complaining about respondent's inattention to her pending lawsuit and failure to appear for appointments. By letter of August 14, 1986, the office of the Counsel for Discipline informed respondent of Seher's complaint and gave respondent 15 days to respond. Respondent replied by letter on April 7, 1987, claiming that he had kept Seher advised of the progress of her pending case, but that Seher had harassed him by unreasonable requests for information. In fact, during the period between August 14, 1986, and April 7, 1987, the following court proceedings were had in the case. A pretrial conference was scheduled and noticed for January 23, 1987. Respondent failed to appear at the conference. The court directed defendant's counsel to file a motion for summary judgment supported by affidavits and briefs and to advise respondent of the February 13, 1987, deadline for filing countermotions, briefs, and affidavits. Defendant filed a motion for summary judgment and, on February 23, 1987, respondent was granted an extension to March 2, 1987, for filing a resistance to the motion. Respondent failed to file any

response, and summary judgment was entered for defendant against Seher on March 9, 1987. Respondent failed to notify Seher of the judgment. Seher learned of the judgment from other sources after the time for appeal had expired. Respondent's unsupported explanation for his inaction was that he had previously informed Seher that the issues in her case were barred by an adverse judgment in a separate compensation case and that her pending suit was without merit. Seher denied this conversation.

Following hearing, the referee reported a finding that the allegations in the complaint had been established, and made a recommendation that a reprimand be issued accompanied by an opportunity for respondent to voluntarily surrender his license upon condition that it not be reinstated for at least 6 months and only after other affirmative showings to be made by respondent. Relator excepts to the recommended disciplinary sanctions. Respondent failed to file his written brief in this court.

We review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof, bearing in mind that cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. See *State ex rel. NSBA v. Frank*, 214 Neb. 825, 336 N.W.2d 557 (1983). The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Cohen*, 231 Neb. 405, 436 N.W.2d 202 (1989).

In *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 747, 294 N.W.2d 873, 878 (1980), we said that a "[v]iolation of any of the ethical standards relating to the practice of law or any conduct of an attorney . . . which tends to bring reproach on the courts or the legal profession [constitutes] grounds for suspension or disbarment."

The record clearly demonstrates that respondent has violated his oath of office and the disciplinary rules alleged in the complaint. Respondent, after notice, continually failed to

professionally attend to the interests of his client, which failure was compounded by his letter of April 7, 1987, after default judgment, claiming that he had kept his client, Seher, informed of the pending proceedings. His excuse that the lawsuit was without merit is unacceptable. An attorney who neglects a matter entrusted to him has failed to act competently. See *State ex rel. NSBA v. Doerr*, 216 Neb. 504, 344 N.W.2d 464 (1984). In addition, respondent's failure to attend judicial hearings, his failure to file delayed pleadings pursuant to his own requests, and his failure to otherwise respect and perform his duties as an officer of the courts brings the courts and the legal profession into disrepute. There is no evidence of respondent's present capability to perform his duties as a lawyer.

While disbarment is a harsh penalty to impose upon an attorney with 40 years of bar membership, we conclude that a judgment of disbarment is appropriate.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLANT, V. ROGER M. WESSELS, JR., APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. GREGORY D. CHEEK, APPELLEE.

439 N.W.2d 484

Filed May 5, 1989. Nos. 88-475, 88-476.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Final Orders.** An order of the Director of Motor Vehicles suspending an operator's license is as final and binding as the judgment or final order of a court of general jurisdiction.
2. **Judgments: Collateral Attack.** A judgment is not subject to collateral attack unless it is void. A judgment, even if erroneous, cannot be collaterally assailed.
3. **Judgments: Final Orders.** A judgment or order which is conditional and becomes effective only if one or more events take place or do not take place does not perform in praesenti and is void.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Exceptions overruled.

Charles W. Campbell, York County Attorney, for appellant.

Kevin V. Schlender for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

These cases are appeals by the State to review orders of the district court affirming the dismissal after trial of complaints for driving on suspended licenses. In each case the defendant's license and operating privileges had been suspended by the director of the Department of Motor Vehicles because the defendant had failed to comply with a previous traffic citation. In each case the county court found the defendant not guilty and dismissed the complaint at the close of the State's evidence.

Upon appeal to the district court, that court held in each case that the order of the director was void because it was made effective only 19 working days after the date it was issued. Since both cases involve the same question, they were consolidated in this court for argument.

Neb. Rev. Stat. § 60-426 (Reissue 1988) provides:

> The director is authorized to suspend or revoke the license of any resident of this state . . . (3) who has violated a promise to comply with the terms of a traffic citation issued on or after July 1, 1986, by a law enforcement officer for a moving violation in any jurisdiction inside this state until satisfactory evidence of compliance with the terms of the citation has been furnished to the director. The court having jurisdiction over the offense for which the citation has been issued shall notify the director of a violation of a promise to comply with the terms of the citation only after twenty working days have elapsed from the date of the failure to comply.

Both defendants had failed to comply with traffic citations that had been issued to them.

The statute continues:

> Upon notice to the director that a resident has violated a

> promise to comply with the terms of a traffic citation as provided in this section, the director shall not suspend or revoke such resident's license until he or she has sent written notice to such resident by registered or certified mail to the resident's last-known address. Such notice shall state that such resident has twenty working days from the date of the notice to show the director that the resident has complied with the terms of such traffic citation. No suspension or revocation shall be entered by the director if the resident complies with the terms of a citation during such twenty working days.

In case No. 88-475, the director sent an order to the defendant, Roger M. Wessels, Jr., which was dated July 7, 1987, and stated that his license and operating privileges "will be suspended effective August 4, 1987 unless evidence of satisfactory compliance" with his citation was received prior to the date of suspension. Wessels was charged with driving on a suspended license on December 1, 1987, almost 4 months after the suspension should have been effective.

In case No. 88-476, the director sent an order to the defendant, Gregory D. Cheek, which was dated October 29, 1987, and stated that his license and operating privileges "will be suspended effective December 1, 1987 unless evidence of satisfactory compliance" with his citation was received prior to the date of suspension. Cheek was charged with driving on a suspended license on December 8, 1987, some 7 days after the suspension should have been effective.

The State contends that the trial court was in error in finding that the suspension orders issued by the director were void, in holding that the State was required to prove that the director gave the defendants 20 working days before the orders of suspension became effective, and in failing to hold that the defendants lacked standing to object to the failure of the director to give them 20 working days before the suspensions became effective.

As a preliminary matter it is important to note that the statute requires only that the director *notify* a driver who has failed to comply with a traffic citation that the driver has 20 working days from the date of the notice to show to the director

that the driver has complied with the terms of the citation. There is nothing in the statute that requires the director to serve an order of suspension upon the offending driver. Thus, the language in the orders of suspension which stated that the license and operating privileges will be suspended on a date stated was surplusage so far as the statute is concerned.

The State concedes that the "order of suspension" in each case was erroneous. The issue is whether the orders were void.

Neb. Rev. Stat. § 60-420 (Reissue 1984) provides in part: "The ruling, decision, or order of the director in refusing to issue or reinstate such license or in suspending, canceling, or revoking the same shall be as final and binding as the final order or judgment of a court of general jurisdiction." The statute was amended in 1988, but the amendment is not effective until July 1, 1989. See Neb. Rev. Stat. § 60-420 (Reissue 1988).

A judgment is not subject to collateral attack unless it is void. A judgment, even if erroneous, cannot be collaterally assailed. *Shade v. Kirk*, 227 Neb. 775, 420 N.W.2d 284 (1988). When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a "collateral attack." *County of Douglas v. Feenan*, 146 Neb. 156, 18 N.W.2d 740 (1945).

The order of the director was premature in purporting to suspend the licenses before 20 working days had expired. A judgment that is premature is irregular, but generally is not void. See *Bokhoof v. Stewart*, 2 Neb. (Unoff.) 714, 89 N.W. 759 (1902).

There is, however, another objection to the orders of the director that the parties have not raised. In *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987), we held that a conditional judgment was void because it did not "perform in praesenti." In that case the trial court had entered an order that in the event the case was not tried or otherwise disposed of by December 30, 1984, " 'the case will thereupon, without further order of the Court, become automatically dismissed for lack of prosecution unless good cause is shown prior thereto that the same should not be dismissed. . . .' " *Id.* at 291, 404 N.W.2d at 430. The judgment was conditional because the dismissal

depended upon several conditions. In the event the case was "tried or otherwise disposed of," or "good cause was shown" that the case should not be dismissed, then the dismissal was not effective. See, also, *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989); *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988); *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988); *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987).

The orders of the director suffer from the same defect. The orders of suspension were effective only if evidence of satisfactory compliance with the citations was not received by the department prior to the dates of suspension. The orders of suspension were conditional, did not "perform in praesenti," and were therefore void and of no effect. Since no other orders of suspension were offered at the trials of the defendants, the judgments of acquittal were correct, and the judgments of the district court were correct.

EXCEPTIONS OVERRULED.

DENISE ROCHELLE REYNOLDS, APPELLEE, V. JOHN LEE GREEN, APPELLANT.

439 N.W.2d 486

Filed May 5, 1989. No. 88-508.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider and may give weight to the findings of the trial court.
2. **Habeas Corpus: Child Custody.** A question in every habeas corpus child custody case is the welfare and best interests of the child.
3. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and, on appeal, although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Richard M. Fellman and John P. Steichen, of Nye, Fellman, Moylan & Brown, for appellant.

Rita L. Melgares for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

PER CURIAM.

The petitioner, Denise Rochelle Reynolds, and the respondent, John Lee Green, are the unmarried parents of a female child born September 7, 1986. The record shows that the parties met in November of 1984 and soon thereafter began living together in Omaha, Nebraska. Reynolds' 4-year-old son and two of Green's children, a 19-year-old and an 18-year-old, were living with the parties.

Sometime after their child was born, the parties began having difficulties which led to Reynolds' leaving the family home at Eastertime in 1987, leaving both of her minor children in the care of Green. Prior to leaving at Easter, Reynolds had left the home on two other occasions. However, after leaving at Easter, Reynolds told Green that she was through and that "it's over." After that time, the parties had no contact.

On June 12, 1987, Reynolds filed a petition in the district court for a writ of habeas corpus to obtain custody of the child, who was then still living with Green. Reynolds alleged that the respondent Green had the minor child, then 9 months of age, in his possession and was unlawfully and forcibly detaining the child in his home under threat of violence and that the respondent had a pistol in his possession and had previously committed acts of violence against Reynolds. Reynolds prayed that a writ be issued directing the child be brought before the court in order to determine her care, custody, and possession. A writ was issued, with the return day set for June 16, 1987.

At the hearing on return day, the trial court placed custody of the child in the court and awarded possession to Reynolds. Trial was on March 24, March 28, and April 19, 1988. On May 11, 1988, the trial court found that both of the parties were fit and

proper to have custody of the child, but that it was in the best interests of the child that her care, custody, and control be placed with the petitioner subject to specific rights of visitation awarded to the respondent. The respondent has appealed.

The petitioner is 25 years of age. The respondent is 40 years of age. According to Reynolds, the parties argued frequently, and Green, because of his bad temper, struck Reynolds with his fists. Reynolds stated that on more than one occasion Green struck her four or five times with a large leather belt used for weight lifting. In addition, Reynolds testified that Green suffered from chronic back pain and used marijuana on a daily basis for pain relief. Green admitted that he began using marijuana in 1980, but denied using it at the present time.

Anna Foster, an outpatient therapist at the North Clinic family counseling center in Omaha, testified that she met Reynolds in November of 1986 when Reynolds sought counseling at the center because of trouble with her relationship with Green. Foster counseled with Reynolds for about 1 year on a weekly basis and also involved Reynolds in a support group for women who had been molested as children. Reynolds had been sexually abused at the age of 8 by her stepfather. Foster did provide counseling to Reynolds in Reynolds' home about five times, and thus had the opportunity to observe Reynolds in the company of her children. Foster concluded that Reynolds provided adequate care and supervision for her children and that their best interests would be served by placing the child with her mother. Reynolds also counseled with Green on one occasion for about 1 hour. Although she did not find him unfit as a father, she did recommend placement of the child with her mother, as the child had been living with the mother for the last 9 months and to her knowledge there were no significant problems which would indicate the need for a change in the child's placement.

At the time of the hearing, Reynolds was employed in the laundry department of Bergan Mercy Hospital on a full-time basis and was earning $5.07 per hour. Through her employment, Reynolds received health insurance benefits which covered the child involved in this action. Reynolds stated that if she were to gain custody of the child, Reynolds' sister,

who currently babysits for the child, would continue to do so. Prior to the hearing, in July of 1987, Reynolds moved with her two children to a two-bedroom home with a kitchen, a washer and a dryer, a living room, and a bathroom. The male child has his own bedroom, and the female child shares a room with her mother. Reynolds stated that her son and the child involved in this action enjoy a close relationship and that the children have close contacts with her extended family. Finally, Reynolds testified that she and her children routinely attend church services in Omaha.

Green is disabled due to a chronic back condition and receives Social Security disability payments. Green testified as to what he considered to be problems revolving around Reynolds' ability to provide proper care for the minor child. Green related several instances in which he found the child, after having been with Reynolds, to be improperly dressed for the time of year and dirty and odorous, and noted that her body contained rashes, open sores, scars, and scabs. Green had called both the Omaha Police Division and Child Protective Services about the injuries he noted on the child, and had been told that Child Protective Services was going to check into the situation. Green also stated that he frequently took the child to the hospital emergency room for treatment of various ailments and that when he tried to tell Reynolds what had occurred and what treatment was necessary, she became angry and it was impossible to communicate with her. At one point, Green stated that Reynolds became so enraged because he had taken the child to the emergency room that she threw the prescription into the street. Green also told of an episode when he was taking the child to the emergency room and Reynolds followed his car. While he was stopped at a stop sign, Reynolds purposely rammed her car into the rear of Green's car. Green then drove to the police station and reported the incident. However, the testimony concerning these incidents is in conflict.

Green testified that in addition to providing the child with monetary support in the amount of $95 per month through Social Security, he has provided food and clothing for the child.

Betty Nelum, a drug and alcohol counselor for Operation Bridge, testified that she first met Green in July of 1987 when he

entered the clinic for therapy relating to anxiety and emotional problems he was experiencing because of his separation from the child. Green was seen weekly at the clinic, and based on her observations, Nelum testified that Green could be an appropriate father for the minor child. It was her opinion that Green was an honest person, and she believed that he was not currently involved in marijuana use. In February of 1988, Nelum performed a home visit at Green's residence and found the home to be neat and clean; the minor child had adequate room space and her own bed; educational toys were present; and the family members all seemed to get along well.

Green also presented the testimony of his next door neighbors, Meredith and Leonard Harrold, who characterized Green as the "epitome of a good parent."

The appellant's sole assignment of error is that the trial court abused its discretion in awarding custody of the minor child to the child's mother, the appellee herein. In *Hibbard v. Hibbard,* 230 Neb. 364, 365, 431 N.W.2d 637, 638 (1988), we stated that "[c]hild custody determinations are matters initially entrusted to the discretion of the trial court, and, on appeal, although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion." See, *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988); *Svoboda v. Svoboda*, 230 Neb 283, 430 N.W.2d 695 (1988). More specifically, "A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court." *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 656, 419 N.W.2d 531, 533 (1988); *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987), citing *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985).

In addition, this court in *Gaughan, supra* at 840, 401 N.W.2d at 690, stated that "[t]he remaining question present in every habeas corpus case is the welfare and best interests of the child." See, also, *Vance v. Vance*, 231 Neb. 334, 436 N.W.2d 177 (1989).

Although the trial court awarded custody of the minor child to the mother, the trial court stated that "you're both good people. You're both deserving of the child, from the evidence."

The record shows both parties wanted custody of the child and that neither party was considered unfit by any of the witnesses. However, the trial court concluded that it was in the best interests of the child that the mother have custody of the child.

The mother's counselor, Foster, who testified on her behalf, concluded that through her observations of the mother and her children, there was nothing that would indicate that the child would suffer harm from being placed in the mother's custody and that the best interests of the child would be served by such placement. Although the evidence is in conflict, we find the testimony concerning the physically abusive conduct of the father toward the mother a matter of concern. This is not to say that the mother herself is without problems. The mother is employed, has a secure and stable home, is providing health insurance coverage for the child, and has fostered a warm relationship between her son and the minor child involved in this case. Of significance is the fact that the child has resided with her mother since June 16, 1987, a period of almost 2 years. Without strong evidence indicating the need for a change in custody, we conclude that the judgment of the trial court placing custody with the mother should not be disturbed. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARYL L. SCHRODER, APPELLANT.
439 N.W.2d 489

Filed May 5, 1989. No. 88-530.

1. **Trial: Rules of Evidence: Witnesses.** Under Neb. Evid. R. 612, Neb. Rev. Stat. § 27-612 (Reissue 1985), a party seeking access to a document used to refresh a witness' recollection bears the burden of establishing that the document sought was actually used by the witness to refresh recollection for the witness' testimony.
2. _____: _____: _____. Neb. Evid. R. 612 does not afford unrestricted access

to all documents in the possession of the opposing party, but only to those documents used by the opposing party's witness to refresh the witness' recollection.

3. _____: _____: _____. Under Neb. Evid. R. 612, an objection that the requested document contains information unrelated to the witness' testimony is resolved by submitting the entire document to the court for an in camera review of the document, during which the court shall excise material which is unrelated to the subject matter of the witness' testimony.
4. **Criminal Law: Trial: Appeal and Error: Words and Phrases.** Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Casey J. Quinn for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

SHANAHAN, J.

After a bench trial in the county court for Douglas County, Daryl L. Schroder was convicted of drunk driving in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988) and was sentenced. Schroder appealed to the district court, which affirmed the decision of the county court. Schroder contends that the county court improperly denied him access to police reports which Schroder asserts were essential to effective cross-examination of the arresting officer. Schroder relies on Neb. Evid. R. 612, which provides:

> If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of

> the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.

Neb. Rev. Stat. § 27-612 (Reissue 1985).

About 9:30 p.m. on August 27, 1987, Omaha Police Officer Edward Sinkevich was parked in his cruiser near 20th and Q Streets in Omaha. Sinkevich looked to his right and noticed a man, whom Sinkevich later identified as Schroder, urinating on the sidewalk. Schroder then entered his car, began driving northbound on 20th Street, and was followed by Sinkevich. Although a centerline was not painted or otherwise marked on 20th Street, Schroder was driving his vehicle 2 to 3 feet to the left of the center of the street, in the lane for southbound or oncoming traffic. Schroder traveled only one block and, as soon as he learned that he was being followed by a police cruiser, which was seen in the rearview mirror of Schroder's car, pulled "to the right quickly and parked his vehicle" before the rotating and flashing lights were activated on the police cruiser. Other than the presence of Sinkevich's cruiser behind Schroder, nothing indicates that Sinkevich did anything to cause Schroder's pulling over and stopping his car. In Sinkevich's words, "I did not pull him [Schroder] over. He went off the roadway - - - ."

Sinkevich parked his police cruiser behind Schroder's stationary car, approached the Schroder vehicle, encountered a strong odor of alcohol from the car's interior, and noticed that Schroder had bloodshot eyes and a flushed face.

After Schroder got out of his car, Sinkevich administered a number of field sobriety tests, which Schroder failed. Sinkevich arrested Schroder for drunk driving and at trial, without objection, testified that Schroder was "too intoxicated to drive."

Before Schroder's trial, the prosecutor and Schroder's lawyer apparently reached some sort of agreement regarding the admissibility of the results from an Intoxilyzer breath test administered to Schroder. We use the word *apparently* in view

of the exchange before the trial court:

> [Prosecutor]: Your Honor, prior to — pretrial, I talked to [defense counsel] about some stipulations — correct me if I'm wrong . . . , the State and defense stipulating that the intoxilyzer, Model 4011-AS . . . was in correct operating, passed beyond the 27th of August, 1987. We would further stipulate that all the proper maintenance procedures were done; all the proper qualifications set out by Title 177 were met, and finally we're stipulating that the breath test result on Mr. Schroder on the 27th of August, 1987, was .127 grams per 210 liters of breath, and I would offer this and ask that it be received, the test results.
>
> THE COURT: A copy thereof?
>
> [Prosecutor]: It is a copy, Your Honor.
>
> THE COURT: Marked as exhibit 1. Is that your understanding?
>
> [Defense counsel]: It's my understanding that if the proper persons were called, that sufficient foundation would be laid for that, but not probable cause for having to submit to it in the first place. I think - - -
>
> THE COURT: Well, we're not talking about - - -
>
> [Prosecutor]: - - - (Indiscernible) receiving it.
>
> THE COURT: - - - the test being .127.

The record does not reveal whether the court received the Intoxilyzer test results as evidence, although the parties seem to have thought that the test results were in evidence, as later demonstrated by the prosecutor's reference to such results during his closing argument.

After Sinkevich, the only witness against Schroder, had testified on direct examination and recounted the facts set forth above concerning Schroder's arrest, defense counsel, during cross-examination of Sinkevich, discovered that Sinkevich had used part of the officer's written report made on the night of Schroder's arrest to refresh the officer's recollection about the events leading to Schroder's arrest. Defense counsel then asked to see Sinkevich's report, and the prosecutor complied by producing a two-page narrative, filled out by Sinkevich on the night of the arrest. Defense counsel then requested that the

State turn over to counsel the "entire report," to which request the State objected, and the following immediately occurred in open court:

> THE COURT: [To defense counsel.] What was it you specifically want . . . ?
>
> [Defense counsel]: He wrote down in his report that he gave a coin test, Your Honor, and that he fumbled on - - -
>
> THE COURT: You can cross examine him as to that.
>
> [Prosecutor]: You heard his testimony as to the tests he gave the defendant.
>
> [Defense counsel]: There's a test in the report that he doesn't mention this time.
>
> THE COURT: He hasn't mentioned, you know, this time. You can ask him when he gave it to him, what the results are. Then if he denies that he gave it to him, and it's [in] the report, then you can impeach him.

Cross-examination of Sinkevich resumed with his admitting that in the officer's written arrest report he had marked that a "coin test" had been given to Schroder, whereas no such test was administered. Schroder testified in his own defense and admitted consuming three alcoholic drinks in the hour preceding his arrest. At the conclusion of evidence, the court found Schroder guilty of drunk driving as charged.

Schroder bases his appeal on the alleged failure of the county court to apply the provisions of Neb. Evid. R. 612, which is patterned on, but not identical to, Fed. R. Evid. 612. We note that in his appellate argument Schroder relies on Neb. Evid. R. 612, but at trial never asserted Rule 612 as the basis for his requested inspection of the "entire" police report prepared by Sinkevich.

Under Neb. Evid. R. 612, a party seeking access to a document used to refresh a witness' recollection bears the burden of establishing that the document sought was actually used by the witness to refresh recollection for the witness' testimony. See *Rawlings v. Andersen,* 195 Neb. 686, 240 N.W.2d 568 (1976). See, also, *United States v. Larranaga,* 787 F.2d 489, 501 (10th Cir. 1986): "[Fed. R. Evid. 612] is limited. It only requires disclosure of the passage actually used by the witness, and other portions relating to the same subject matter"; *Smith & Wesson v. United States,* 782 F.2d 1074 (1st

Cir. 1986). Neb. Evid. R. 612 does not afford unrestricted access to all documents in the possession of the opposing party, but only to those documents used by the opposing party's witness to refresh the witness' recollection. See, *Henson v. State*, 258 Ga. 600, 372 S.E.2d 806 (1988); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 612[05] (1988). Under Neb. Evid. R. 612, an objection that the requested document contains information unrelated to the witness' testimony is resolved by submitting the entire document to the court for an in camera review of the document, during which the court shall excise material which is unrelated to the subject matter of the witness' testimony.

In the trial of Schroder's case, the court failed to follow the procedure prescribed in Neb. Evid. R. 612, and determined that Schroder was not entitled to the remainder of Sinkevich's written report without referring to the report itself. Furthermore, the report was not preserved in the record for an appeal notwithstanding the express requirements of Neb. Evid. R. 612. The county court erred in its failure to follow the procedure prescribed in Neb. Evid. R. 612 and by denying Schroder's access to all potentially relevant information in the police report used by Sinkevich to refresh his memory in connection with the officer's testimony.

In his brief, Schroder maintains that the trial court's refusal to allow access to the entire police report resulted in a denial of Schroder's right to a fair trial. Schroder maintains that the remainder of Sinkevich's written report could have been used to impeach Sinkevich's testimony regarding (1) probable cause for stopping Schroder and (2) a field sobriety test which was not administered but incorrectly marked in the arrest report as an administered test. Schroder's contention relative to probable cause is perplexing, given (1) that Sinkevich did not stop Schroder, who voluntarily stopped his car on seeing the trailing police cruiser in the rearview mirror of the Schroder vehicle, and (2) the fact that defense counsel did not object on constitutional grounds to the admission of Sinkevich's testimony regarding Schroder's intoxicated condition. Regarding Schroder's argument that he could have impeached Sinkevich's testimony by pointing out that a sobriety test marked in the report was not administered, we note that

counsel was able to cross-examine Sinkevich effectively without access to the police report, and actually obtained Sinkevich's admission that a "coin test" had not been given, as stated in the officer's written report made after Schroder's arrest.

Rejection of Schroder's request for access to the remainder of Sinkevich's written report was harmless error inasmuch as no "substantial miscarriage of justice" occurred as a result of the error. See Neb. Rev. Stat. § 29-2308 (Reissue 1985). Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant. See *State v. Vejvoda,* 231 Neb. 668, 438 N.W.2d 461 (1989). The error of the county court, that is, failure to adhere to Neb. Evid. R. 612, is harmless beyond a reasonable doubt. Cf. *State v. Cox,* 231 Neb. 495, 437 N.W.2d 134 (1989).

It is difficult to comprehend how the county court's rejection of Schroder's request for access to the entire police report could have prejudiced Schroder's defense, considering the undisputed evidence of Schroder's inebriation, Schroder's own admission that he drank alcohol shortly before driving his vehicle, and Sinkevich's opinion that Schroder was "too drunk to drive," evidence which was admitted without objection. See *State v. Cox, supra* (objection necessary to preserve claimed error for appellate review). See, also, *State v. Pribil,* 227 Neb. 397, 417 N.W.2d 786 (1988).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BENNY LEE BUTTS, APPELLANT.

439 N.W.2d 493

Filed May 5, 1989. No. 88-722.

1. **Convictions: Appeal and Error.** A judgment of conviction will not be reversed on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.

2. _____: _____. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Sexual Assault: Corroboration.** After the victim of a sexual assault has testified to the commission of the offense, it is competent to prove in corroboration that, within a reasonable time after the assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened.
4. _____: _____. It is not necessary that the victim of a sexual assault make the complaint at the first available opportunity, particularly if the victim is afraid and ashamed of what has happened. It is only necessary that the complaint be within a reasonable amount of time following the assault.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

HASTINGS, C.J.

Following a trial by jury, the defendant was convicted of first degree sexual assault involving a victim less than 16 years of age, a Class II felony, and was sentenced to a term of imprisonment of 4 years. He has appealed, assigning as his sole error the alleged insufficiency of the evidence. We affirm.

A judgment of conviction will not be reversed on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *State v. Brister*, 231 Neb. 263, 435 N.W.2d 679 (1989); *State v. Anderson*, 229 Neb. 436, 427 N.W.2d 770 (1988).

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict

must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Burghardt*, 231 Neb. 240, 435 N.W.2d 673 (1989); *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989).

The defendant, his wife, and her six children, including the victim, moved from Arkansas to Omaha in March of 1987. The defendant's 12-year-old stepdaughter alleged that after the family arrived in Omaha, the defendant began "messing" with her. She told her younger brother what the defendant was doing to her and then stated that she was just kidding when he said he was going to tell their mother. Sometime in late October or early November of 1987, the victim, while spending a weekend with her godmother, also told her godmother what was happening, but requested her godmother not to tell the victim's mother, fearing that the mother would not believe it and would beat her.

According to the victim's testimony, on the night of Wednesday, December 9, 1987, she was at home with the defendant and her siblings while her mother was out. After her siblings had gone to bed, she was in the basement ironing when the defendant came downstairs, wearing only a bathrobe. The defendant called her over to him, grabbed her, and tried to touch her breasts. Although she struggled and got away, the defendant caught her, put her on the floor, and penetrated her with his "privacy."

The following Sunday, according to the victim, she attempted to relate the incident to her godmother at a party, but could not do so since her mother was nearby.

On December 15, 1987, the victim, having been sent to the principal's office for misbehaving in class, told the assistant principal that her stepfather had sexually assaulted her the week before. The next day the assistant principal notified the Omaha police, and Officer Denise Cousin interviewed the victim. The victim told Officer Cousin that her stepfather "had been touching her the way that a man would touch a woman" and that the most recent incident occurred on Wednesday, December 9, 1987. Subsequently, the victim was removed from her home and placed in foster care, and the defendant was arrested for sexual assault.

Dr. Helen Sinh-Dang, a pediatrician who examined the

victim on December 22, 1987, testified that the victim's hymen had a tear in it, which would not be expected in the case of a 12-year-old girl. She testified that such a tear would have to be caused by the insertion of an object into the vagina and that it could be caused by a part of the male anatomy. The physician further testified that, in her opinion, the tear in the hymen would have to have been caused at least a couple of days before the examination, but beyond that, she could not speculate as to the time.

There was testimony from the victim's mother, her brother, and two relatives of the defendant's, which contradicted, in some measure, the testimony of the victim. The mother stated outrightly that she did not believe the victim. There was reference to earlier events which would cast some doubts on the veracity of the victim. The defendant chose not to testify.

Although 1989 Neb. Laws, L.B. 443, which became effective March 14, 1989, repealed Neb. Rev. Stat. § 29-2013 (Reissue 1985), thus eliminating the requirement of corroborating evidence in a sexual assault case, clearly sufficient corroboration existed in this case.

After the victim has testified to the commission of the offense, it is competent to prove in corroboration that, within a reasonable time after the assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened. *State v. Andersen*, 231 Neb. 458, 436 N.W.2d 537 (1989). It is not necessary that the victim of the assault make the complaint at the first available opportunity, particularly if the victim is afraid and ashamed of what has happened. It is only necessary that the complaint be within a reasonable amount of time following the assault. *State v. Narcisse,* 231 Neb. 805, 438 N.W.2d 743 (1989).

Taking the view of the evidence most favorable to the State, as we are required to do, there is sufficient evidence, if believed, to support the conviction. The jury in this case believed the victim's testimony. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. FINNEGAN, APPELLANT.

439 N.W.2d 496

Filed May 5, 1989. No. 88-743.

1. **Probation and Parole.** Violation of a single condition of probation provides a sufficient ground to revoke probation.
2. _____. A judge revoking probation should make a specific finding for each charge of acts alleged to constitute a violation of probation.
3. **Probation and Parole: Proof.** While the revocation of probation is a matter entrusted to the discretion of the trial court, unless the probationer admits to a violation of a condition of probation, the State must prove the violation by clear and convincing evidence.
4. **Trial: Evidence: Appeal and Error.** The failure to object to the receipt of evidence at trial constitutes a waiver of the right on appeal to assert prejudicial error in the reception of such evidence.
5. **Controlled Substances: Words and Phrases.** Marijuana is a Schedule I controlled substance and, as such, is a "drug." Neb. Rev. Stat. §§ 28-404 (Reissue 1985) and 28-405(c)(10) and (15) (Cum. Supp. 1988).
6. **Probation and Parole: Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Probable Cause: Controlled Substances.** A condition of probation which requires a probationer to submit to a search of his or her personal property at any time, by any law enforcement officer, with or without probable cause, for controlled substances, is valid, enforceable, and constitutional under the fourth amendment, if it is applied in a reasonable manner and contributes to the rehabilitation of the probationer.
7. **Sentences: Probation and Parole: Appeal and Error.** A sentence imposed after revocation of probation and within statutory limits will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.
8. **Appeal and Error.** The Nebraska Supreme Court need not consider issues which have not been assigned as errors.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

John F. Steinheider, of Hoch & Steinheider, for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

CAPORALE, J.

Defendant-appellant, Edward A. Finnegan, was, on an earlier occasion, convicted by the district court of third degree

assault and sentenced to probation. Upon a subsequent finding that Finnegan had violated a term of his probation, the district court revoked probation and, instead, sentenced Finnegan to incarceration for a period of 6 months and ordered him to pay court costs. Finnegan assigns as error the district court's (1) failure to specify which condition of probation he violated, (2) finding the evidence sufficient to prove that he violated any term of his probation, (3) finding that the conduct charged constituted a violation of the terms of his probation, (4) finding that the State was authorized to subject him to drug-use testing, and (5) imposing an excessive sentence. We affirm.

In relevant part the district court's order of June 17, 1987, placed Finnegan on probation for a period of 18 months under a number of terms and conditions, including that Finnegan (1) not possess or use any "narcotic drugs or cannabis" except by prescription and (2) pay court costs of $180.90 and make restitution in the sum of $991.40. "Cannabis" is a technical name for marijuana. Webster's Third New International Dictionary, Unabridged 327 (1981). The probation order further required Finnegan to subject himself "without just cause" to testing for the purpose of determining his possession or use of drugs.

Neb. Rev. Stat. § 29-2268 (Reissue 1985) permits a court, upon determining that a probationer has violated a condition of probation, to "revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted." Violation of a single condition of probation is sufficient. *State v. Clark*, 197 Neb. 42, 246 N.W.2d 657 (1976).

On November 17, 1987, 5 months into the period of probation, Finnegan's probation officer asked him to submit a urine sample for purposes of drug testing. Finnegan did so, and the Nebraska State Patrol crime laboratory chemist performing the analysis concluded that the sample demonstrated Finnegan had used marijuana since the date of the probation order. Because Finnegan had paid only $50 toward the amounts the court had ordered he pay, the State moved to revoke probation on the grounds that Finnegan had both used marijuana and failed to make the ordered payments.

The first assignment of error, that the district court failed to specify the grounds on which it was revoking probation, rests on the fact that in the course of announcing its decision, the judge below suggested it appeared Finnegan may have violated conditions of probation which the State's motion did not address. What Finnegan overlooks, however, is that the judge not only said he based his decision solely on the ground that Finnegan had used marijuana, but made a written finding to that effect. He further specifically rejected the failure of payment as a ground because the evidence failed to show Finnegan was capable of making the ordered payments. Thus, although the judge below may have said more than was necessary, he ultimately acted in compliance with the good practice described in *State v. Jaworski*, 194 Neb. 645, 234 N.W.2d 221 (1975), of making a specific finding for each charge of acts alleged to constitute a violation of probation.

The second assignment of error questions the sufficiency of the evidence to support the district court's finding that Finnegan used marijuana after entry of the probation order.

It is appropriate to begin the analysis of the issues presented by this assignment of error by recalling that while the revocation of probation is a matter entrusted to the discretion of the trial court, unless the probationer admits to a violation of a condition of probation, the State must prove the violation by clear and convincing evidence. *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987); Neb. Rev. Stat. § 29-2267 (Reissue 1985).

The finding that Finnegan used marijuana rests on the testimony of the state chemist mentioned earlier. It is true, as Finnegan contends, that the chemist testified that without knowing a person's rate of metabolism, size, weight, and body mass, as well as the quantities and purity of the substance used, it would be impossible to determine the length of time that any given level of marijuana metabolites would remain in the system. However, the chemist also testified that the screening test he used was such that it would not detect the presence of the trace amounts of marijuana metabolite which would be present in a urine sample provided by one who had refrained from using the substance between June 17, 1987, the date of the probation

order, and the date Finnegan provided a sample of his urine, November 17, 1987. Such testimony constitutes clear and convincing evidence that Finnegan did in fact use marijuana after entry of the probation order.

The third assignment of error, that the use of marijuana does not constitute a violation of probation, ignores the fact that the probation order specifically prohibited Finnegan from using marijuana.

The fourth assignment of error urges that the test for marijuana constituted an unreasonable search in violation of Finnegan's fourth amendment rights. This assertion first ignores that Finnegan failed to object to the evidence resulting from the test. We have repeatedly held that the failure to object to the receipt of evidence at trial constitutes a waiver of the right on appeal to assert prejudicial error in the reception of such evidence. *State v. Greeno*, 230 Neb. 568, 432 N.W.2d 547 (1988); *State v. Todd*, 226 Neb. 906, 416 N.W.2d 13 (1987). The assertion also disregards this court's determination in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), that a condition of probation which requires a probationer to submit to a search of his or her personal property at any time, by any law enforcement officer, with or without probable cause, for controlled substances, is valid, enforceable, and constitutional under the fourth amendment, if it is applied in a reasonable manner and contributes to the rehabilitation of the probationer. See *U.S. v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989). It cannot seriously be argued that weaning a law offender from the use of marijuana is not rehabilitative.

To the extent Finnegan can be said to contend that the test for marijuana violated his fourth amendment rights because the probation order authorized "drug" testing and marijuana is not a drug, as the term is used in relevant statutes, his contention is simply wrong. Neb. Rev. Stat. §§ 28-404 (Reissue 1985) and 28-405(c)(10) and (15) (Cum. Supp. 1988) make marijuana a Schedule I controlled substance, simple possession of even less than an ounce of which is made unlawful by Neb. Rev. Stat. § 28-416(6) (Cum. Supp. 1988). See, also, *State v. Kells*, 199 Neb. 374, 259 N.W.2d 19 (1977). Thus, it cannot be said the judge below abused his discretion in revoking Finnegan's

probation.

This brings us to the fifth and last assignment of error, which claims the sentence imposed is excessive. We have held that a sentence imposed after revocation of probation and within statutory limits will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge. *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988). The maximum sentence which may be imposed for third degree assault, which under the present circumstances is a Class I misdemeanor, is "not more than one year imprisonment, or one thousand dollars fine, or both." Neb. Rev. Stat. §§ 28-310 (Reissue 1985) and 28-106(1) (Cum. Supp. 1988). The sentence imposed is within statutory limits and arises from an incident in which Finnegan stabbed another. We find nothing which permits us to say the sentence imposed constitutes an abuse of discretion.

We do not overlook the fact that Finnegan devoted a substantial part of his brief to the claim that the judge below improperly took notice of the probation order because it was not received in evidence, and he at no time said he was going to take notice of it. However, he assigns no error to this treatment of the order, and, thus, we do not consider it. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); Neb. Rev. Stat. § 25-1919 (Reissue 1985). See, *State v. Narcisse,* 231 Neb. 805, 438 N.W.2d 743 (1989); *State v. Greeno, supra.* We are nonetheless constrained to observe that the suggestion the judge below did not state he was taking notice of his earlier probation order is patently frivolous in face of the fact he on no less than three occasions during the course of the hearing made specific reference to that document. Moreover, a court must take judicial notice of its own records in the case under consideration and also has the right to examine its own records and take judicial notice of its own proceedings in an interwoven and dependent controversy where the same matters have already been considered and determined. *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979).

Since the record fails to establish any of Finnegan's assigned errors, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF S.C., S.J., AND B.C., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.D.C., APPELLANT.

439 N.W.2d 500

Filed May 5, 1989. No. 88-744.

1. **Parental Rights: Juvenile Courts: Evidence: Appeal and Error.** In an appeal from a judgment or order terminating parental rights, the Supreme Court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
2. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
3. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the child that parental rights be terminated.
4. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Ted N. Sleder, of Sleder Law Office, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

BOSLAUGH, J.

The appellant is a mother whose parental rights to her three minor children were terminated by the Douglas County Juvenile Court on July 26, 1988. The juvenile court found that the appellant had failed to comply with the terms of a reasonable rehabilitation plan, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988), and that the children were within the meaning of § 43-292(2), in that the mother "[had]

substantially and continuously or repeatedly neglected the [juveniles] and refused to give the [juveniles] necessary parental care and protection."

The proceeding was commenced by a petition filed by the State in the juvenile court on July 26, 1985, which alleged that the children, girls born January 3, 1980, and January 16, 1982, and a boy born September 1, 1983, were lacking proper parental care by reason of the faults and habits of the appellant mother. Specifically, the petition alleged that the mother was an alcoholic, was physically abusive to the children, had failed to provide adequate food, and had left the children alone for prolonged periods of time without adult supervision or protection. The petition prayed for termination of the mother's parental rights.

An order for immediate custody was entered on July 26, 1985, and a hearing on the petition was held on August 14, 1985. At the hearing the mother did not resist detention, and custody in the Nebraska Department of Social Services (DSS) for temporary foster care was continued.

An adjudication hearing was held on October 24, 1985. At that hearing the mother admitted that the children had been born out of wedlock and that she suffered from a "dependence upon alcoholic beverages and controlled substances," which impairs her ability to provide the necessary parental care, protection, and supervision required by the children. The other allegations were dismissed on the motion of the State, and the hearing as to termination was continued.

At the hearing on December 17, 1985, the court adopted a rehabilitation plan, which required that the mother:

> 1. Refrain from the usage of alcohol or illegal drugs;
>
> 2. Participate in an out-patient chemical dependency program as indicated by the terapist [sic] and enroll in an in-patient program if necessary;
>
> 3. Obtain and maintain suitable housing . . .
>
> 4. Obtain a GED and/or employment;
>
> 5. Have reasonable rights of visitation as arranged by the Child Protective Service worker;
>
> 6. Cooperate with workers on this case to include notifying the Court within 48 hours of a change in

residence or employment.

At the hearing the mother testified that she had been arrested three times since July—twice for disorderly conduct and once for solicitation of prostitution. She had spent 6 weeks in jail for soliciting and had been involved in two stabbing incidents. The mother denied having an alcohol problem, but stated that she intended to give up drinking.

Review hearings were held on March 17, 1986, June 17, 1986, February 27, 1987, August 27, 1987, and February 24, 1988.

At the March 17, 1986, hearing the court reviewed the plan of rehabilitation, ordering the same requirements, with the addition that the mother "remain free from all municipal, state or federal arrests." Count III of the original petition, relating to termination of parental rights, was dismissed without prejudice.

The probation officer testified as to the contents of her report to the court and stated that the mother had occasionally used alcohol since the last hearing, but that she had voluntarily entered an inpatient treatment program. The mother had spent a week in jail during January for disorderly conduct. She had attended but one session to obtain her GED and had missed the others.

On June 17, 1986, the matter was again reviewed; the children were ordered to remain in the custody of DSS; and the mother was ordered to undergo medical and psychological evaluations. According to the testimony and reports received at the hearing, the mother had been drinking, had been arrested for disorderly conduct, and had spent 30 days in jail for prostitution. The mother was also charged with carrying a concealed weapon. The probation officer stated that the mother had been successful in maintaining her sobriety for a couple of months, which gave the workers and the court hope that she could be reunited with her children. During the previous 3 months, the mother had not attended all of the scheduled visitations with her children because of her incarcerations. The mother had attended three visitations with alcohol on her breath and had displayed violent behavior in fighting with her family.

At the August 28, 1986, review hearing the court ordered the

mother to participate in an outpatient chemical dependency program and follow any recommendations made by medical, psychological, or psychiatric personnel. The court continued the prior requirements of the plan. The medical and psychological reports ordered at the prior review were received without objection, although none of the medical personnel testified at the hearing. The psychiatrist's report stated that the mother did not require medical treatment for depression at that time. The medical report states that she had gonorrhea, and the psychologist's report diagnosed the mother as having an antisocial personality disorder and recommended that she be evaluated to rule out chemical dependence.

At the review hearing on February 27, 1987, the court continued the above requirements and ordered the mother to participate in an inpatient chemical dependency program. The probation officer testified that during the review period, the mother had been jailed for 30 days for trespassing; that there was an outstanding warrant for her arrest for failure to pay the trespassing fine; and that she had appeared intoxicated and belligerent at a visit with her children. Further, the mother had been charged with child abuse of children who had been placed with her mother as foster children. The mother again denied having an alcohol problem, denied having been drunk when she visited her children, and strongly objected to inpatient treatment for alcoholism. In October 1986, the mother had attended a 3-day testing program for CETA, but did not attend the job training program. She had been hospitalized in September for hepatitis. The court ordered the mother begin the inpatient treatment program at the Hastings Regional Center.

At the review hearing on August 27, 1987, the probation officer reported that the mother had successfully completed the inpatient program in April, but had failed to report to her scheduled aftercare program and had started drinking again. However, the mother had entered the Lincoln Indian Center halfway house program on July 17, 1987, and was not using alcohol, was working, and was doing volunteer work at the halfway house. The court ordered that the mother complete the Lincoln Indian Center halfway house program, along with the

other requirements of the plan. The son was being followed by the specialized foster care unit of DSS because of his behavior problems. The other two children were doing fine. During her stay at the halfway house, the mother maintained contact with the children by visits and telephone calls.

The plan was again reviewed, on February 24, 1988. The court found that, although reasonable efforts had been made to reunite the family, it would be contrary to the welfare of the children to return them to the appellant, and the children were ordered to remain in the custody of DSS.

At the hearing, the probation officer reported that the mother had been suspended from the Lincoln Indian Center program on December 4, 1987, for breaking curfew and returning to the center intoxicated. She was to attend a partial care program until the time she was scheduled to enter inpatient treatment. The mother was arrested January 1, 1988, for stabbing a man in Lincoln, and had been incarcerated prior to the review hearing. The son was still in specialized foster care and was experiencing temper tantrums as a result of his uncertainty about his attachments. It was the opinion of the guardian ad litem for the children, the probation officer, the son's psychologist, and the DSS caseworker that the mother's parental rights should be terminated.

On March 21, 1988, the Douglas County attorney filed a motion to terminate the mother's parental rights based on § 43-292(6), in that reasonable efforts under the direction of the court had failed to correct the conditions leading to the determination that the children were children as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). In the motion, the State requested that the court take judicial notice of its prior records pursuant to *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979).

Hearing on the motion to terminate parental rights commenced on June 16, 1988. The hearing was continued from May 18, 1988, because the appellant was incarcerated.

Vicky Traynham, a senior professional counselor with the North Omaha Alcoholism Counseling Program, testified that she saw the mother December 5, 1985, and January 7, 13, and 23, 1986. Traynham did not see the mother again until July 10,

1986. The mother was to attend counseling weekly during this period. On February 19, 1987, the mother went to Traynham, was very upset, and said that she had abused some foster children that had been placed in the care of her mother. Traynham next saw her on March 20, 1987. Between December 5, 1985, and September 1987, the mother did not successfully complete any outpatient program with the North Omaha Alcoholism Counseling Program.

Diane Sundermeier, a drug and alcohol counselor with the Lincoln Indian Center, testified that the mother began the Indian Center program on July 17, 1987. The program asked for commitments to attend AA meetings, find employment, obtain a GED, and maintain sobriety. The mother was terminated from the program in early December 1987 for violating curfew and for drinking. Sundermeier testified that the mother's greatest need was to maintain sobriety, that she did not successfully complete the Indian Center program, and that, in her opinion, the mother needed inpatient treatment.

Mildred Flansburg, a child psychologist with St. Joseph Center for Mental Health, testified concerning her treatment of the son. She testified that any time the boy was confronted with changes in his caretakers, visits from his birth family, or disappointing experiences, he would throw temper tantrums lasting an hour, throw things, kick out at people, intentionally urinate on furniture, and be unmanageable. She testified that the boy was highly intelligent and manipulative and needed a very consistent, nurturing environment to give him positive experiences for his development. She concluded that it would be very harmful for the boy to remain in foster care for an indeterminate period and that he needed more certainty about his family.

The hearing was then continued to July 25, 1988. At that time Mary Lee Schwietz, the juvenile court probation officer in charge of the case, testified in regard to the rehabilitation orders that had been entered in this case. Schwietz testified that the mother did not obtain her GED; that she was employed for only a short time, from May to July 1987 and in September 1987; that by her own admission to Schwietz, the mother did not refrain from using alcohol; that she did not consistently

participate in the outpatient North Omaha Alcoholism Counseling Program, nor did she complete the Lincoln Indian Center halfway house program; that the mother did not remain arrest-free—she was arrested various times throughout the juvenile court involvement and was in the York women's reformatory for first degree assault at the time of the termination hearing; and that she did not maintain her own housing at any point and had moved approximately 30 times since July 26, 1985.

Gwen Shuman (Opfer), the DSS caseworker assigned to the son's case, testified that during the first half of 1987, the mother did not visit her son regularly, but that during the fall of 1987, the visits were more regular. Shuman testified that the boy was having behavior problems, which were more pronounced when the boy visited with his mother or after such visits. At times when his mother was not visiting, the boy's behavior was more stable. During one visit, the boy and his mother had argued; he left throwing a tantrum; and he tried to open the car door and jump out on the way home after the visit. She testified that the boy had threatened in the past to stab people when he was angry and having tantrums.

Lillie Carther, a social worker in charge of this case for Child Protective Services, testified that she arranged the visits the children had with their mother. She testified that the mother had problems with following the rules for the visits, arrived with unauthorized other persons, and had smelled of alcohol when she visited. At one visit in June of 1986, the mother was threatening to take her children away, "she was out of control, angry, sort of wild acting," and appeared inebriated. The children were very frightened after that visit, and the two girls had actually waited on the porch of the foster home for their mother to get them. On February 3, 1987, the mother arrived at the visit very angry and loud, smelled of alcohol, and admitted having drunk alcohol. In Carther's opinion, the children needed more stability, and 3 years in foster care was long enough. With regard to visitation, in 1986, the mother missed 11 of 50 visits with no excuse; in 1987, she missed 16 visits of 42 possible; and in 1988, she missed all 28 possible visits. Carther testified that she did not think the mother had complied with

the court's orders, though Carther had told the mother that she risked losing her parental rights if she failed to comply. The mother made no excuse for her failure to comply with the orders.

The mother testified that she loved her children. With regard to her alcohol problem, on direct examination the mother testified:

> Q. All right. Do you have an alcohol dependency problem?
>
> A. Yes, I do.
>
> Q. Would you explain to the Court what happens when you have a drink?
>
> A. I just — if I have a drink or two, really nothing. I'd just be kind of high at times. That's about it.
>
> . . . .
>
> Q. Do you feel you now have an alcohol related problem?
>
> A. Do I feel I do now?
>
> Q. Yes.
>
> A. No, I don't.
>
> Q. All right. At the time that — at the time you left the Indian Center, do you feel you had an alcohol related problem?
>
> A. No.

On cross-examination the mother testified:

> Q. You deny you have an alcohol problem; is that correct?
>
> A. Do I deny it? No, I don't deny it.
>
> Q. Okay. You do have an alcohol problem?
>
> A. Somewhat I do. I feel it's under control now, and it would be under control if I was not incarcerated.
>
> . . . .
>
> Q. However, when you had your kids, you admitted you had an alcohol problem that impaired your ability to provide the necessary care, protection and supervision.
>
> A. That's not true. When I had my kids, I wasn't no alcoholic.
>
> Q. Didn't you admit to that?
>
> A. I admitted I drank on occasion, but I was no

alcoholic. When my kids was with me, I don't admit to being no alcoholic.

. . . .

Q. When your kids are not with you, generally speaking not with you, are you saying you do drink?

A. Yeah, I drink.

Q. On occasion?

A. Yes, that's true.

Q. What are the occasions?

A. Just friends coming over and want to get high, meaning — getting high is going to drink a little gin or something. Sure, why not.

Q. Do you feel you can handle drinking today?

A. Do I feel I can handle it? No, I wouldn't do it because I feel alcohol is not important in my life. My three kids is what's important to me, and I feel if I was out now I wouldn't be drinking because I need my kids with me, not in a foster home. I feel I'm capable of taking care of my kids. I feel they want to be with me, too.

The mother testified that she had not obtained her GED, but was to begin testing for it when she returned to the York facility; that she had not had any alcohol in the last half of 1987 and none in 1988; that she had lived with her mother the entire time the court was involved; and that she consistently visited her children, except when she was in treatment or incarcerated. She testified that she had tried to find employment and had two jobs for short periods. She admitted that maybe she needed to look a little harder. She testified that she had not provided her children with a home for the past 2 years, but had attempted to do so. The mother denied that she was drinking when she committed the first degree assault, and said that she was trying to prevent the man from "trying to hit on [her]." She denied that she had been drinking the night she broke curfew at the Indian Center, for which she was terminated from the program. She denied on cross-examination that her arrests were alcohol-related, and stated that she was protecting herself.

At the end of the State's case, over objection, the court took judicial notice of all the records, exhibits, and orders in the case.

Throughout these proceedings, the mother was present and represented by counsel, and the children were represented by a guardian ad litem.

The appellant has assigned as error the admission of hearsay reports in evidence, the finding by clear and convincing evidence that the mother willfully failed to comply with the reasonable provisions of a court-ordered plan, and the finding that termination of the mother's parental rights was in the best interests of the children.

With regard to the first assignment of error, there is a complete verbatim report of the proceedings in the juvenile court, and the reports which the appellant complains about were received in evidence without objection. At many of the hearings, the authors of the reports were present in court and could have been subjected to cross-examination. There is no showing that any of the authors of the reports were not available and that their attendance could not have been compelled by subpoena.

However, it is unnecessary to discuss the first assignment of error further because there is an abundance of sworn testimony in the record that supports a finding by clear and convincing evidence that the appellant willfully failed to comply with the rehabilitation order of the juvenile court and that it is in the best interests of the children that the parental rights of the mother be terminated.

> In an appeal from a judgment or order terminating parental rights, the Supreme Court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 266, 417 N.W.2d 147, 157 (1987).

> " 'In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial

> court observed the witnesses and accepted one version of the facts rather than another.' "

In re Interest of L.O. and B.O., 229 Neb. 889, 889-90, 429 N.W.2d 388, 389 (1988); *In re Interest of J.S., A.C., and C.S., supra.*

The children in this case have been under the court's jurisdiction since August 14, 1985, and the mother admitted on October 24 that she could not take care of her children due to her alcoholism. When the children were adjudicated to be juveniles within the meaning of § 43-247(3)(a), the court ordered a rehabilitation plan. The essence of this plan throughout these proceedings has been to require that the mother maintain her sobriety, participate in various inpatient or outpatient chemical dependency programs, obtain employment and a GED, obtain suitable housing, have reasonable visitation, and cooperate with workers on the case in notifying them of her whereabouts and her employment situation.

> Therefore, regarding parental noncompliance with a court-ordered rehabilitative plan, under § 43-292(6) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

In re Interest of J.S., A.C., and C.S., supra at 267-68, 417 N.W.2d at 158. Materiality is defined as a provision in the plan which tends to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code. *Id.* See, also, *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988).

The appellant did very little to comply with the provisions of the plan. Clearly, sobriety was a material provision of the plan. The mother's alcoholism was the basis for the adjudication that the children were as those defined in § 43-247(3)(a). The mother's maintaining her sobriety would have tended to correct the condition which led to the adjudication. Yet, the mother did not maintain her sobriety for any extended period throughout

the court's involvement. She participated in two inpatient treatment programs, but failed to participate in aftercare programs designed to help her maintain her sobriety. During the final review periods prior to the filing of the termination motion, the mother participated successfully in a halfway house program for a while and was employed for two short periods. However, she failed to maintain her sobriety and ultimately was involved in a stabbing for which she was sentenced to the York women's reformatory. Although she testified at the hearing on the motion to terminate that she felt her alcohol problem was under control, her actions speak louder than her words. At the hearing she was equivocal in admitting that she had an alcohol problem.

During this proceeding, the mother never obtained independent housing, but lived with her mother, her stepfather, and various friends. She never established a home at which she could receive custody of her children. In fact, at the time the motion was filed, the mother was in prison and was not requesting custody of the children. The mother did not complete her GED, although she was given several opportunities to do so. At the termination hearing, the mother testified that while in the York facility, she was working on her GED and would begin testing for it soon. This was too little, too late. The mother did not remain arrest-free for any extended period of time. She was arrested for disorderly conduct, soliciting prostitution, trespassing, and, finally, first degree assault. Although she did exercise her visitation rights on occasion, she failed to comply with the most important terms of the plan, which were designed to correct the adjudication that the children were juveniles as defined by the Nebraska Juvenile Code.

The mother admitted at the adjudication hearing that she had an alcohol problem. Instead of following the court's direction, which was designed to help her correct the situation, the mother ignored the plan. She failed to get her alcohol problem under control. She failed to create an environment under which she could again accept custody of her children. She had no income and no home. She was reported to have been drinking in December 1987, just before the petition was filed.

A psychologist testified that the son was having severe behavior problems, specifically because of his unstable situation. The daughters were reported to be doing well in foster care, but the caseworkers testified that the children would be better off in a permanent situation. As we have stated before, " 'A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.' " *In re Interest of Z.D.D. and N.J.D., supra* at 243, 430 N.W.2d at 556.

We find by clear and convincing evidence that the mother willfully failed to comply with the reasonable provisions of the rehabilitation plan and that it was in the best interests of the children to terminate her parental rights. The judgment is affirmed.

AFFIRMED.

FRANCES QUINN, APPELLANT, V. ARCHBISHOP BERGAN MERCY HOSPITAL AND AETNA INSURANCE COMPANY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEES.

439 N.W.2d 507

Filed May 5, 1989. No. 88-807.

1. **Workers' Compensation: Appeal and Error.** In reviewing a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence.** In testing the sufficiency of evidence to support the findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Health Care Providers.** To determine whether a claimant is entitled to workers' compensation benefits for home health care, three basic requirements must be met: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the spouse or other health care provider must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse or other health care provider.

4. **Workers' Compensation: Health Care Providers: Words and Phrases.** In a workers' compensation case, ordinary, noncompensable housekeeping tasks include cleaning, preparation of meals, and washing and mending clothes. Compensable tasks include serving meals in bed, bathing and dressing, administering medication, and assisting with sanitary functions. Compensation is not allowed for ordinary household duties which are performed by a spouse.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John W. Wynkoop for appellant.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees Archbishop Bergan Mercy Hospital and Aetna Insurance Company.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

WHITE, J.

Frances Quinn appeals to this court following a decision of the Workers' Compensation Court modifying an award on rehearing. In the first hearing the claimant was awarded at least 4 hours of home health care a day. On rehearing, the Workers' Compensation Court modified the award, reducing the amount of home health care to 1 1/2 hours per day. It is with this modification the appellant claims error, contending that a minimum of 3 to 4 hours of home care a day is medically necessary.

A review of the record establishes the following facts. The appellant, Frances Quinn, is a 55-year-old woman. As a result of injuries suffered while in the appellee Archbishop Bergan Mercy Hospital's employ, Quinn has undergone three hip surgeries, the third resulting in a total hip revision. Quinn requires the use of a brace for her hip and the use of crutches for ambulation. Following Quinn's release from the hospital after the hip revision surgery, the appellee Aetna Insurance Company was notified by a representative of the social services department of the Mayo Clinic that Quinn would need assistance upon her return to Omaha. This home care began on October 5, 1986, and continued at the level of 6 hours a day each day her husband was at work, through July 5, 1987.

On July 6, Aetna reduced the home health care allowance to

1 1/2 hours for each day Mr. Quinn was working outside the home. This reduction was instituted after Quinn contacted Aetna requesting that Aetna pay for her to be placed on the Optifast liquid diet program. Quinn said if she was on the program, the home health care aides would no longer be required to cook for her. Because Aetna had no idea that these aides were preparing Quinn's meals, they began closely reviewing precisely what the home help was doing during their stay at the Quinn residence. Upon closer examination, Aetna discovered that the home health care workers were performing what Aetna determined were primarily housekeeping functions for Quinn. Aetna then asked Quinn how much time the home health care workers spent assisting her in the bath, getting her dressed, and helping with her exercises. She replied about 1 1/2 hours, and Aetna reduced the home care time accordingly.

The appellant's husband is employed outside the home from 7 a.m. to 4 p.m., 5 days a week. Mr. Quinn generally prepares the evening meal, although Quinn testified that she sometimes prepares it for the two of them as her husband is tired when he gets home from work. When he is home, the husband will help Quinn with her showers.

Dr. C. Michael Kelly, appellant's attending physician, testified that the appellant did not require total nursing care, but that she did require assistance in the home with tasks such as housecleaning, bathing, and cooking. However, Dr. Kelly did state that the only medical help required is assistance in performing the strengthening exercises for Quinn's leg and hip. Dr. Kelly would order these exercises for 15 to 20 minutes a day, 2 to 3 days a week.

Neb. Rev. Stat. § 48-120 (Reissue 1988) provides that "the employer shall be liable for all reasonable medical, surgical, and hospital services" and that the Workers' Compensation Court "shall have the authority to determine the necessity, character, and sufficiency of any medical services." In reviewing a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr.*, 228 Neb. 38, 421 N.W.2d 25

(1988); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). In testing the sufficiency of evidence to support the findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Fees v. Rivett Lumber Co., supra.* As stated above, the compensation court found that the medical needs of Quinn required only 1 1/2 hours a day of care when her husband was at work. We find no reason to overturn that finding.

In determining what care is compensable by the injured claimant, this court has distinguished between care which is medical, and therefore recoverable, and purely custodial or housekeeping services, which are not recoverable. This court most recently addressed the issue of home health care in *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., supra.* In *Currier*, the plaintiff was injured when he fell into a fertilizer spreader from the back of a truck. As a result of the accident, Currier suffered a spinal injury and underwent surgery for a spinal fusion. Because of the severity of these injuries, Currier was confined to a hospital for over 2 years. The claimant was released from the hospital, upon the condition that he receive full-time nursing care at home. Although Currier's doctor had not prescribed any specific medical regimen after his release from the hospital, his doctor testified that Currier needed assistance in everyday tasks such as bathing, preparation of meals, and getting dressed; that he needed someone to relieve his pain during a muscle spasm; and that he needed someone to help him in the event of a fall. He also required a daily inspection for sores and infections.

In *Currier*, we adopted the test set forth by the concurrence in *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978), for determining when home health care is a compensable expense. Although *Spiker* involved home health care provided by a spouse, in *Currier* we held that there is no distinction between the care provided by a spouse and that provided by an unrelated person. To determine whether the claimant is entitled to workers' compensation benefits for home health care, three basic requirements must be met: (1) The employer must have knowledge of the employee's disability and

need of assistance as a result of a work-related accident; (2) the care given by the spouse or other health care provider must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse or other health care provider. In the present action, the first and third elements are easily met. It is the second element that is fatal to the appellant's claim.

As listed above, the care must be "extraordinary and beyond normal household duties." In this case, the care providers were primarily providing Quinn with housekeeping assistance, such as laundry, preparation of meals, and cleaning. As stated in *Currier, supra* at 45, 421 N.W.2d at 30: "Ordinary, noncompensable housekeeping tasks include cleaning, preparation of meals, and washing and mending clothes. Compensable tasks include serving meals in bed, bathing and dressing, administering medication, and assisting with sanitary functions." (Citations omitted.) In this action, the home health care providers are at the Quinn home for 1 1/2 hours each day. The only "medically necessary" task they are providing, according to Dr. Kelly, is assistance with Quinn's strengthening exercises, an activity Dr. Kelly testified in his deposition would take 15 to 20 minutes a day, 2 to 3 days a week. In addition, the care providers are currently assisting Quinn with her bath and in dressing. There is no evidence that this activity cannot be completed within the hour of compensable time remaining after her exercises have been performed. The other services that were being provided to Quinn, such as housecleaning, laundry, and preparing her breakfast and lunch, were clearly not compensable. As stated in *Currier, supra* at 44-45, 421 N.W.2d at 29:

> We note that this court is in accord with other jurisdictions which deny compensation for ordinary household duties which are performed by a spouse. The basis for such holdings is that a spouse performs such duties both for herself [in this case himself] and for her husband [wife] as a part of the marital relationship. Such considerations are not present in this case.

In contrast, these considerations *are* present in this case. Because Mr. Quinn is available to perform such duties as housecleaning, laundry, and meal preparation, Aetna cannot be required to pay another to perform these routine household tasks.

The Workers' Compensation Court determined that the services performed by the home health care providers were normal housekeeping services and were not medically necessary. In reviewing a workers' compensation case, findings of fact made by the Workers' Compensation Court will not be set aside unless clearly wrong. *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr.*, 228 Neb. 38, 421 N.W.2d 25 (1988). Since there is evidence supporting the compensation court's judgment, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. BOBBY L. HAYWOOD, APPELLEE.

439 N.W.2d 511

Filed May 5, 1989. No. 89-121.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed.

Ronald L. Staskiewicz, Douglas County Attorney, and Robert C. Sigler for appellant.

Marc B. Delman for appellee.

FAHRNBRUCH, J.

The State of Nebraska appeals from a Douglas County District Court order suppressing statements made by Bobby L. Haywood to Omaha police officers during a custodial interrogation. A review hearing was held before a single judge of this court pursuant to Neb. Rev. Stat. § 29-116 (Reissue 1985). The suppression order is reversed.

Haywood was charged with unlawful possession of a

controlled substance with intent to deliver. The defendant filed a motion to suppress statements he made to police officers while being interrogated after his arrest. After a suppression hearing, the trial judge ruled that Haywood's statement to police "was not voluntary and the result of promises, coercion and untruthful statements of the police. Further, the court finds that the statements given to the second police officer to interrogate the defendant fails [sic] for the reason that the defendant did waive [sic] his Miranda rights." I assume, as do both parties, that the trial judge intended to find that the defendant *did not* waive his *Miranda* rights prior to being interrogated by the second officer.

The State assigns two errors: (1) that the district court erred in concluding that Haywood's statement to police was not voluntarily given, and (2) that the district court erred in its apparent finding that police officers were required to reissue *Miranda* rights before Haywood was interrogated by a second officer.

The State bears the burden in a suppression hearing to show by a preponderance of the evidence that the defendant's statements were voluntary and, therefore, admissible. To be admissible the statements must have been given freely, voluntarily, and without promises or inducements on the part of the State. Voluntariness will be tested by the totality of the circumstances, and the finding of the trial court will not be set aside unless clearly wrong. *State v. Dickson*, 224 Neb. 136, 395 N.W.2d 770 (1986); *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). See, also, *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

At approximately 4 p.m. on October 26, 1988, police officers saw the defendant and four other persons on the porch of an apartment building at 1920 North 30th Street in Omaha, Nebraska. The building is one of several owned by the Omaha Housing Authority (OHA) and commonly known as "the projects." Citizens and OHA had asked the police to crack down on gang problems and narcotics activity in that area. Two weeks before this incident, a citizen had informed police that "crack cocaine" was being sold on the front step of 1920 North

30th Street.

Officer Daniel Clark, one of the arresting officers, testified that he recognized four of the parties on the apartment building porch, including the defendant. Clark also stated that three of the individuals, again including the defendant, had admitted to being members of a Los Angeles-based gang known as the "Crips." According to the officer's testimony, this gang deals in violence and drugs.

While approaching the group on the porch, Officer Clark observed a plastic package containing a white powdery substance on a cement area near the porch and about 2 feet from the individuals. On the porch, the officer found a plastic bag containing 11 "rocks" of suspected crack cocaine. This bag was approximately 2½ to 3 feet immediately below the defendant, who was seated on the porch wall. All five parties were arrested and transported to the Central Police Station.

At the station, the five suspects were separated for individual interrogation by narcotics officers. Officer Dennis Clark questioned the defendant. Prior to beginning the interrogation, this Officer Clark read the defendant his constitutional rights as required by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). After Haywood waived his rights, the officer placed a chemical called cobalt thiasufinade on the defendant's hands. This chemical reacts with cocaine residue by turning blue. It is used by the Omaha Police Division as a field test for the presence of cocaine. Officer Dennis Clark testified that the chemical also reacts with other substances and can turn blue as it dries. The cobalt thiasufinade did turn blue when placed on Haywood's hands.

After the chemical test, Officer Dennis Clark began questioning the defendant. Haywood denied any involvement with the cocaine found at the time of his arrest. As the interrogation continued, the officer pointed out conflicts in Haywood's answers. Each time, Haywood changed his version of the facts. As officers questioned the five suspects, the officers maintained contact with each other and relayed the responses being given by each suspect. When told of conflicts between the others' statements and his, Haywood again

changed his story. However, he continued to maintain that the cocaine was not his.

Eventually, Dennis Clark obtained the assistance of another narcotics officer, Mark Sundermeier. At the request of Clark, Sundermeier entered the interrogation room and informed Clark that Haywood's fingerprints had been found on the bag confiscated from the porch. Both officers testified that this was not true, but was an artifice designed to elicit an accurate response from Haywood. After being told his fingerprints were on the bag, Haywood admitted that he had held the bag at one time that afternoon. He remained adamant in his statement that the cocaine was not his and that he had held the bag for a friend named Mike.

When Officer Sundermeier finished questioning the suspect he had been assigned, he returned to assist Officer Dennis Clark. Clark was needed for another segment of the investigation and left the room for a few minutes. Before leaving, Clark told Sundermeier what Haywood had said. Haywood indicated that Clark's version was correct. The interrogation continued with Officer Sundermeier questioning Haywood. Officer Clark returned after 5 to 10 minutes, and Haywood was booked.

The first assigned error is the district court's finding that Haywood's statements to police officers were not given voluntarily. The State argues that the court's finding that the statements resulted from promises, coercion, and untruthful statements by police is clearly wrong. At oral arguments, both parties stated, and the record reflects, that no promises were made to Haywood by any police officer. Accordingly, that portion of the district court's finding, that Haywood's statements resulted from promises, is clearly wrong and must be reversed. The district court's ruling that Haywood's statements were involuntary because of coercion and untruthful statements is also clearly wrong.

A statement must be suppressed if it is obtained by offensive police practices or is obtained under circumstances in which the free choice of the defendant was significantly impaired. See *State v. Dickson*, 224 Neb. 136, 395 N.W.2d 770 (1986). The defendant asserts that two offensive police practices were used

in his interrogation: (1) the cobalt thiasufinade chemical test and (2) the fingerprint artifice. Haywood argues that these tactics are so coercive as to render his statements to the police officers involuntary.

The cobalt thiasufinade was placed on Haywood's hands immediately after he waived his *Miranda* rights. Officer Dennis Clark testified that the test is used by narcotics officers in the field to determine whether cocaine residue is present. Clark himself had been using the chemical for about 3 years. While the chemical may eventually react with substances other than cocaine, if cocaine is present the reaction happens quickly.

The officer testified that he used the chemical on Haywood because there were five parties who could have possessed the cocaine. It was possible that Haywood had possessed the cocaine and that there was residue on his hands. When asked if he used the chemical to trick Haywood into admitting possession of the cocaine, Officer Clark responded in the negative.

The defendant asserts that use of the test was coercive because cocaine residue on his hands was only a "possible fact situation." Haywood argues that Officer Clark was only interested in possibilities and not in the truth. This argument is not supported by any evidence in the record. The plain fact is that two bags of cocaine were found in the vicinity of five individuals. It was incumbent upon the police to determine which, if any, of those individuals should be charged with possession of the cocaine. Officer Clark testified that he was using an approved method for determining whether one of those individuals, Haywood, could have possessed the cocaine. This was his job.

The record shows no indication of improper use of the chemical or of improper motive on the part of Officer Dennis Clark. And there is no evidence to suggest that the chemical did not react quickly. Finally, even after his hands turned blue, Haywood denied any involvement with cocaine. The chemical test obviously did not coerce Haywood into making any incriminating statements. The State met its burden of proving by a preponderance of the evidence that Officer Dennis Clark's use of cobalt thiasufinade on defendant Haywood's hands was

not an offensive police practice and was not coercive.

Haywood also argues that he was coerced by the officer's untrue statement that his fingerprints were on the bag containing crack cocaine. While the artifice set up by Officers Clark and Sundermeier is clearly deceptive, it is not necessarily an offensive police practice. The test for determining admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986); *State v. Stevenson & Jackson*, 200 Neb. 624, 264 N.W.2d 848 (1978).

Haywood again asserts that Officer Dennis Clark was interested in obtaining a desired response to a possible fact situation rather than in obtaining the truth. The fingerprint ruse was used only after Haywood changed his story numerous times. These changes were the result of his being confronted with conflicts in his story and in his version of the facts compared with those of the others. The only "fact situations" Clark had to work with were those being given him by Haywood and by the other questioning officers. Haywood's story could be nothing more than a possibility since it was continually changing. Both Officer Clark and Officer Sundermeier testified that their goal was to obtain the truth. There is no evidence to contradict these assertions.

After being told his fingerprints were on the bag, Haywood stated that he had held the bag for a friend. It is important to note that Haywood maintained this version of the facts throughout the rest of his interrogation by both officers. The preponderance of the evidence indicates that the use of the fingerprint artifice did not result in a false or untrustworthy statement. Under the totality of the circumstances, police officers' untruthfully telling Haywood his fingerprints were on the bag of crack cocaine was not an offensive police practice and was not coercive. See, *Finke v. State*, 56 Md. App. 450, 468 A.2d 353 (1983) (finding that police lies to defendant, including that his fingerprints were recovered at crime scene, did not render defendant's statements involuntary); *State v. Winters*, 27 Ariz. App. 508, 556 P.2d 809 (1976) (finding that defendant's incriminating statements were not inadmissible on grounds that

police coerced defendant by untruthfully telling him his fingerprints were found at crime scene); *Sovalik v. State*, 612 P.2d 1003 (Alaska 1980) (finding that untruthfully telling defendant his fingerprint was found at crime scene was not coercive and did not have a tendency to produce an untruthful statement).

Neither the cobalt thiasufinade chemical test nor the fingerprint artifice was an offensive police practice requiring suppression of Haywood's statements to police.

Next considered is whether Haywood's statements were made under circumstances in which his free choice was significantly impaired. In other words, was the situation such that an innocent defendant would be induced to incriminate himself? I find that it was not.

Both Sundermeier and Dennis Clark testified that Haywood was not under the influence of drugs or alcohol while being interrogated. He understood their questions and responded coherently. Haywood did not complain of his physical or mental well-being. The officers made no promises or threats; Haywood was not beaten or otherwise physically abused; and there is nothing in the record to indicate that the officers tried to work on the defendant's emotions or feelings of guilt.

Haywood presented no evidence in his own behalf. There is nothing to contradict any of the officers' testimony regarding the circumstances of Haywood's interrogation, and the record gives no indications of improper inducement by the officers.

The preponderance of the evidence does not show circumstances in which an innocent defendant was induced to incriminate himself. Haywood's free choice was not impaired. The district court's finding that Haywood's statements to police officers are involuntary because they are the result of coercion and untruthful statements by police is clearly wrong and is reversed.

The State's last assigned error is that the trial court erred in its apparent finding that police officers were required to reissue *Miranda* rights before Haywood was interrogated by Officer Sundermeier. As stated above, the record clearly shows that Haywood was advised of his *Miranda* rights and that he waived those rights before being questioned by Officer Dennis Clark.

The defendant has not claimed that he did not waive his *Miranda* rights freely, voluntarily, knowingly, and intelligently. The *Miranda* warnings were not given a second time before Officer Sundermeier questioned Haywood during Clark's absence from the room. The trial court apparently found that Sundermeier was required to give Haywood his rights again before taking over for Clark. If so, this finding is erroneous.

In *Stumes v. Solem*, 752 F.2d 317 (8th Cir. 1985), plaintiff was questioned by police officers after waiving his *Miranda* rights. Five hours after the interrogation ended, officers resumed questioning the plaintiff without reissuing the *Miranda* warnings. The U.S. Court of Appeals for the Eight Circuit held that *Miranda* warnings were unnecessary prior to the resumption of interrogation. The court reasoned that the plaintiff was aware of his rights and voluntarily chose not to exercise them. "To require the police to reissue *Miranda* rights under these circumstances would serve no real purpose." 752 F.2d at 321. See, also, *Wyrick v. Fields*, 459 U.S. 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982).

Questioning of Haywood, by both officers, lasted a total of 1 1/2 hours. When Clark left the room, Sundermeier continued the interrogation until Clark returned a few moments later. No purpose would be served by requiring Sundermeier to reissue *Miranda* rights to Haywood before continuing the interrogation. The finding by the district court in this regard is clearly wrong and is reversed.

The district court's rulings that Haywood's statements to Omaha police officers were involuntary and that the police were required to reissue *Miranda* warnings before a second officer could continue the interrogation are clearly wrong and are reversed.

REVERSED.

IN RE ESTATE OF BESSIE I. PETERSON, DECEASED. FRANCIS J. GLINN ET AL., APPELLANTS, V. ELDON J. PETERSON ET AL., APPELLEES.

439 N.W.2d 516

Filed May 12, 1989. No. 87-406.

1. **Directed Verdict.** Upon a motion for directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the opposing party. The party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced from the evidence.
2. _____. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
3. **Wills: Undue Influence: Proof.** In order to successfully contest a will or codicil on the ground of undue influence, the contesting parties must prove by a preponderance of the evidence that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
4. **Wills: Undue Influence: Words and Phrases.** Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator.
5. **Wills: Words and Phrases.** One possesses testamentary capacity if he understands the nature of his act in making a will or codicil thereto, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
6. **Wills.** Testamentary capacity is tested by the state of the testator's mind at the time the will or codicil is executed.

Appeal from the District Court for Arthur County: DONALD E. ROWLANDS II, Judge. Affirmed.

Sandra I. Schefcik, of Schefcik Law Firm, for appellants.

Robert E. Roeder, of Roeder & Anderson, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

The parties to this action are the five sons of the decedent, Bessie I. Peterson. Appellants, Francis J. Glinn, Marvin L. Peterson, and Dale I. Peterson (contestants), filed a "Petition for Formal Probate of Will and Formal Appointment of

Personal Representative" in the county court for Arthur County, seeking the admission to probate of Mrs. Peterson's last will and testament, executed September 6, 1972, and objecting to a codicil to the will, executed January 16, 1985. Appellees, Eldon J. Peterson and Donald R. Peterson (proponents), are the proponents of the codicil, and Eldon Peterson apparently had offered the will and codicil for informal probate. Contestants' petition alleged, in part, that Mrs. Peterson executed the codicil as the result of undue influence on the part of Eldon Peterson and that Mrs. Peterson lacked testamentary capacity when she executed the codicil. All parties conceded the validity of the 1972 will.

Pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 1985), the matter was transferred to the district court for Arthur County. At the request of the parties, venue was transferred to Keith County pursuant to Neb. Rev. Stat. § 24-902 (Reissue 1985), and the matter was tried before a jury in Keith County. The only issues at trial concerned the status of the codicil.

The will and codicil were received in evidence during the proponents' case in chief, and proponents then rested. After the close of the contestants' case, the district court sustained proponents' motion for a directed verdict on the issue of undue influence and directed a verdict for the proponents on that issue. The proponents then presented rebuttal testimony. At the close of all the evidence, the district court overruled both parties' motions for directed verdict on the remaining issue of testamentary capacity, and that issue was submitted to the jury. The jury returned a verdict for the proponents on the issue of testamentary capacity. The contestants timely appealed and assign as errors in this court the actions of the trial court in (1) granting the proponents' motion for directed verdict on the issue of undue influence and (2) failing to grant contestants' motion for directed verdict on the issue of testamentary capacity in that the proponents did not prove by a preponderance of the evidence that Mrs. Peterson had testamentary capacity at the time she executed the codicil. We affirm.

The record shows the following. Marvin, Dale, Eldon, and Donald Peterson are the sons of the decedent and her late

husband John Peterson. Francis Glinn is Mrs. Peterson's son by a previous marriage. The family lived on John Peterson's 14,000-acre livestock ranch in Arthur County while the five sons were growing up and attending high school.

All of Mrs. Peterson's five sons worked on the ranch while they were in high school. Donald, Dale, and Marvin Peterson all attended college.

Appellant Francis Glinn testified that he returned to work on the ranch for 3 years after leaving the merchant marine in 1946. For the past 30 years, Glinn has operated his own livestock ranch 9 miles north of Keystone, Nebraska.

Appellant Dale Peterson testified that he attended Kearney State College after graduating from high school in 1948, and continued to work on the family ranch during college vacation. He decided to leave the ranch because "there didn't seem to be enough for all of us there." Dale formerly taught in Hastings. He currently resides in Omaha and teaches at Metropolitan Community College.

Appellant Marvin Peterson, the youngest son, testified that he had full responsibility for the ranch from the time he graduated from high school in 1957 until 1959, when Eldon returned from the Army. Marvin attended the University of Nebraska in 1959 and worked on the ranch during summer vacations until he graduated with an engineering degree in 1964. He lives in Ponca City, Oklahoma, and is employed as an engineer.

Appellee Donald Peterson is the oldest son of Bessie and John Peterson and works as a chemical engineer in Columbus, Nebraska. He testified that he worked on the ranch during college vacations and, even after college, has returned regularly to help with branding cattle.

Appellee Eldon Peterson, the second-youngest son, did not go to college, but stayed on the ranch with his father and mother. Marvin Peterson admitted that Eldon was on the family ranch "everyday of his life" except the time he spent in the Army. John Peterson was semiretired in 1959 when Eldon returned from the Army, and Eldon assumed management of the ranch at that time.

When John Peterson died in 1968 at the age of 78, he devised

one-half of the ranchland to his wife, and undivided interests in the other half to his sons, Marvin, Dale, Eldon, and Donald, subject to Eldon's option to purchase the land at a price designated in John Peterson's will. Francis Glinn received a legacy of $10,000 cash from John Peterson.

Eldon and his mother continued the cattle operation on an equal partnership basis. At the time of Mrs. Peterson's death in January 1985, Eldon owned three-fourths and she owned one-fourth of the 14,000-acre ranch.

Mrs. Peterson had medical problems for many years, beginning with the removal of her left kidney in 1956. On September 6, 1972, Mrs. Peterson executed her last will and testament, devising equal shares of her real and personal property to her five sons, subject to Eldon Peterson's option to purchase certain farm and ranchland. The will named Delbert O. Cole as executor and Keith County Bank & Trust Company as substitute executor of the will.

Mrs. Peterson remained on the ranch after her husband's death and kept house for Eldon until 1982, when she had a stroke and was placed in a nursing home. After the stroke, her left side was essentially paralyzed, but she was sometimes able to walk with the help of a physical therapist. Eldon visited his mother at least once a week during the time she was in the nursing home. The other Peterson sons lived some distance away, but also visited their mother on a somewhat regular basis, two or three times a year. Appellant Glinn, who operated his own ranch north of Keystone, testified he visited his mother "probably a half a dozen times" in 3 years.

Several witnesses testified during the contestants' case as to Mrs. Peterson's physical and mental state after her stroke. Nursing home personnel testified that Mrs. Peterson was "alert" during 1982 and 1983. During that period, she could feed herself, wheel herself in her wheelchair, write letters, watch television, use the telephone, and hold conversations. She apparently suffered a renal failure in the fall of 1984. A nurse's aide testified that by December 1984 Mrs. Peterson was "somewhat alert, [but] wasn't totally alert." There is evidence that Mrs. Peterson sometimes was disoriented as to time, that she made errors in her correspondence, and that her letters to

relatives did not totally make sense.

A doctor examined Mrs. Peterson on January 5, 1985, in the Ogallala hospital emergency room. She had been diagnosed as diabetic some time prior to this examination. He testified that in January 1985 Mrs. Peterson had very erratic blood pressure and gross intestinal bleeding. She was taking a variety of medications, complained of weakness, and was unable to eat. The doctor did not give Mrs. Peterson an orientation test. He was of the opinion that a person in her condition taking these medications might possibly have trouble with clear thinking, but was unable to form an opinion as to whether Mrs. Peterson had the necessary testamentary capacity on January 5 to make a will or codicil.

During the last month of her life, Mrs. Peterson sometimes appeared depressed and withdrawn, and often cried. She had difficulty eating, lost weight, slept frequently, and lost interest in her appearance. She told the nurse's aides she believed she was going to die. Like other elderly patients, however, Mrs. Peterson had "good days and bad days." Nursing home employees testified that on a good day, she was cheerful and able to respond.

In early December 1984, Eldon Peterson told his mother's attorney, James A. Lane, that Mrs. Peterson wanted to see him at the nursing home to discuss a change in her will. Neil Williams, a partner of Lane's, testified that Mrs. Peterson, not Eldon, was their client, although Williams did meet with Eldon once or twice to get a list of machinery. Williams also researched the issue of testamentary capacity and prepared a memorandum to Lane, his senior partner, about topics that should be covered when interviewing Mrs. Peterson. Williams testified that he participated in a conference with Mrs. Peterson and assisted in drafting the codicil.

On January 16, 1985, Mrs. Peterson executed the codicil to her will, changing the provisions of her will by devising to Eldon Peterson all her livestock and household goods. The codicil also modified the will in nominating Eldon Peterson as personal representative of the estate. The codicil did not modify the will in any other respect.

Mrs. Peterson's execution of the codicil, and the signing by

the witnesses to the codicil, was videotaped at the nursing home. Eldon Peterson was not present, but arrived at the nursing home after the codicil was signed. The conversation between Lane and Mrs. Peterson before the execution of the codicil also was videotaped. In that conversation, Mrs. Peterson was asked about the extent of her property, about the time of her husband's death, and about the time of a fire that destroyed her home. When asked why she wanted to leave all her cattle to Eldon, she stated that Eldon "took care of me all these years. He's been good to me, and he's a good manager." She wanted to give Eldon her household goods because "he paid for most of them" after the fire. In response to other questions, Mrs. Peterson indicated she realized that under the terms of the codicil Eldon would receive a larger share than the other children, but that "[Eldon] worked harder. . . . And he stayed there at home when none of the rest of them did." She further stated that she wanted to change her will, signed the codicil, and said, "I'm doing it because I want to."

Mrs. Peterson died on January 25, 1985, at the age of 81.

We review this probate case for error appearing on the record. *In re Estate of Miller,* 231 Neb. 723, 437 N.W.2d 793 (1989).

Contestants first contend that the trial court erred in granting the proponents' motion for directed verdict on the issue of undue influence.

In order to successfully contest a will or codicil on the ground of undue influence, the contesting parties must prove by a preponderance of the evidence that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence. *In re Estate of Price,* 223 Neb. 12, 388 N.W.2d 72 (1986); *In re Estate of Villwok*, 226 Neb. 693, 413 N.W.2d 921 (1987); *Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988). Not every exercise of influence will vitiate a will. Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator. *In re Estate of Price, supra*; *In re Estate of Villwok, supra.*

Upon a motion for directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the opposing party. The party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced from this evidence. *In re Estate of Price, supra.* A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989).

In granting proponents' motion for directed verdict on the issue of undue influence, the district court determined that the evidence presented by the contestants, when taken in a light most favorable to the contestants, established that while Mrs. Peterson was vulnerable to undue influence because of her age and health, and Eldon had an opportunity to exercise undue influence because he saw his mother once a week, there was no evidence at all to suggest that Eldon was disposed to exercise undue influence or that the codicil was clearly the effect of such influence. Rather, the terms of the codicil reflected Mrs. Peterson's recognition of the special business relationship she had with Eldon for 17 years. That relationship was not shared with any of her other children.

After reviewing the record, we determine that the trial court did not err in granting the proponents' motion for directed verdict on the issue of undue influence.

The contestants also contend that the district court erred in overruling their motion for directed verdict on the issue of testamentary capacity, made at the close of the proponents' rebuttal testimony.

One possesses testamentary capacity if she understands the nature of her act in making a will or codicil thereto, knows the extent and character of her property, knows and understands the proposed disposition of her property, and knows the natural objects of her bounty. *In re Estate of Villwok, supra.* Testamentary capacity is tested by the state of the testator's mind at the time the will or codicil is executed. *Id.*

Several of the contestants' witnesses testified to Mrs. Peterson's general decline during 1984 and that she had good

days and bad days during the last month of her life. Mrs. Peterson had not discussed the terms of her will or the codicil with any of the witnesses other than attorneys Lane and Williams.

Only three of the contestants' witnesses specifically recalled seeing Mrs. Peterson on the day the codicil was executed. Teresa Gibson, a nurse's aide, recalled seeing attorneys and video equipment at the nursing home on January 16, 1985. Gibson testified that she stood in an open doorway and watched some of the videotaping. She observed that Mrs. Peterson was in her wheelchair, with her head down and her eyes closed, and appeared to be asleep. Dora Caudy, the laundry supervisor at the nursing home, testified that she had been asked to witness the codicil, but was reluctant to do so because, "I just didn't think that she knew what she was doing." The jury saw the videotape of the signing of the codicil, and by its verdict, it is apparent that it gave little weight to this testimony. Our examination of the videotape on this appeal leads to the same conclusion.

During the videotaped conversation, Mrs. Peterson stated her age as 79 rather than 81 and made mistakes regarding the year her house burned down and the year her husband died. She misstated that the ranch consisted of 1,400 acres but corrected herself, agreeing that the ranch was 14,000 acres. She was aware that she owned a one-fourth interest in the ranch and knew generally the extent of her cattle holdings. Mrs. Peterson also was aware that she held certificates of deposit, but did not know the exact amount of money so held. She stated that Eldon told her everything about the business. When naming her sons, she had to be reminded of Marvin, but she knew where all her sons lived and knew their occupations. Mrs. Peterson acknowledged that her stroke affected the use of her left arm but said, "It didn't hurt my head any."

Due to the manner in which the case was tried on the issue of testamentary capacity, the bulk of proponents' evidence was presented in their rebuttal case. Lane, an attorney of 47 years' experience, testified that at the time of this trial, more than 50 percent of his practice involved probate work, and that he had drafted over 4,000 wills or codicils during the course of his

career. Lane met with Mrs. Peterson on January 13, 14, 15, and 16. During those meetings, she had contemplated disinheriting Glinn, but decided not to do so. Mrs. Peterson told Lane she wanted to give Eldon her interest in the cattle because she was grateful for all Eldon had done for her and was worried about the burden it would be for him to raise the cash to buy cattle from the estate. She also requested that the codicil name Eldon as personal representative. Lane testified he was of the opinion that on January 16, 1985, Mrs. Peterson knew generally the extent of her property, knew what was in the codicil, knew what she was doing in the codicil with the property, and knew the purposes of a codicil. Williams, who was present during the videotaping, also testified that Mrs. Peterson had the capacity to execute the codicil.

Rebuttal witness Charley Simineo, the nursing home administrator on January 16, 1985, witnessed the codicil. At the time of trial, Simineo was employed as health/medical facilities coordinator for the State of Wyoming. He holds a bachelor's degree in gereology from the University of Northern Colorado in Greeley. Simineo testified that it was common for elderly people to mix dates, years, and periods of time between occurrences. He was aware that Mrs. Peterson had this problem, but was of the opinion that it would not affect her mental capacity. Simineo also was of the opinion that on January 16, 1985, Mrs. Peterson knew the natural objects of her bounty, the extent and nature of her property, and the nature of her signing the codicil, and understood the proposed disposition of her property in the codicil. He further testified that Caudy, a witness called by the contestants, had not been asked to witness the codicil, as she had testified.

Appellee Donald Peterson was not present at the nursing home on January 16 but, based on his review of the videotape, was of the opinion that on January 16 his mother knew the members of her family, that she knew in general what she owned, that she knew she was executing a codicil that changed her will, and that she knew what the codicil was for. Donald Peterson obviously was testifying against his own personal financial interest, in that the codicil reduced his share of his mother's estate. Donald testified that his mother had a close

relationship with Eldon and that some time after her will was executed she "made a very special point of telling me that she was going to take care of Eldon because he was considerate of her needs and wishes and she appreciated it. I have known it for years, what she intended to do." He testified that he became a proponent of the codicil when, "Finally it got to the point that only due, my mother's reputation . . . I felt duty-bound, there was nothing I could do but to agree to help support what she wanted to do."

The testimony relating to the issue of testamentary capacity was not such that reasonable minds could draw but one conclusion therefrom. The trial court properly overruled both contestants' and proponents' motions for directed verdict and submitted the issue to the jury. The evidence was sufficient to establish by a preponderance that Mrs. Peterson understood the nature of her act, knew generally the extent and character of her property, knew and understood the proposed disposition of her property, and knew the natural objects of her bounty. The errors assigned are without merit.

The judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

GREENWOOD RANCH, INC., A NEBRASKA CORPORATION, APPELLANT, V. MORRILL COUNTY BOARD OF EQUALIZATION, APPELLEE.

439 N.W.2d 760

Filed May 12, 1989. No. 87-520.

1. **Taxation: Equity: Appeal and Error.** An appeal from a county board of equalization is tried by the district court de novo as in equity and considered by this court de novo on the record from the district court. Where credible evidence is in conflict, this court may give weight to the fact that the trial judge observed the witnesses and accepted one version of the facts over another.
2. **Taxation: Valuation: Presumptions: Appeal and Error.** On appeal, a court presumes the board of equalization faithfully performed its duties in making an assessment and acted upon sufficient competent evidence to justify its action.

The presumption remains until there is competent evidence to the contrary.

3. **Taxation: Valuation.** For tax purposes, counties must assess property at its actual value.
4. **Taxation: Valuation: Words and Phrases.** "Actual value" is a property's value ascertained by using the following formula where applicable: (1) earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property. Neb. Rev. Stat. § 77-112(1) (Reissue 1986).
5. **Taxation: Valuation: Evidence: Appeal and Error.** Where the evidence shows the assessed value of property has been determined by a formula in substantial compliance with Neb. Rev. Stat. § 77-112 (Reissue 1986), which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to the valuation.
6. **Evidence: Appeal and Error.** Where the testimony objected to is substantially similar to evidence admitted without objection, no prejudicial error has occurred.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed.

A.T. Reddish, of Reddish & Schneekloth, for appellant.

Jean Rhodes, Morrill County Attorney, for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

FAHRNBRUCH, J.

Plaintiff, Greenwood Ranch, Inc., appeals a Morrill County District Court order affirming the $170,355 valuation placed upon improvements on Greenwood Ranch by the Morrill County Board of Equalization (Board) for the 1986 tax year. We affirm.

Greenwood Ranch's assignments of error may be summarized that the trial court erred (1) in upholding the Board's valuation of the improvements and (2) in admitting testimony of the Board's appraiser, Tim Rounds, concerning the equalization of valuations across the county.

An appeal from a county board of equalization is tried by the district court de novo as in equity and considered by this court de novo on the record from the district court. Where credible evidence is in conflict, this court may give weight to the fact that

the trial judge observed the witnesses and accepted one version of the facts over another. *Affiliated Foods Co-op v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201 (1988); *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

On appeal, a court presumes the board of equalization faithfully performed its duties in making an assessment and acted upon sufficient competent evidence to justify its action. The presumption remains until there is competent evidence to the contrary. *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982); *Gradoville v. Board of Equalization*, 207 Neb. 615, 301 N.W.2d 62 (1981). The presumption amounts to a burden on the property owner to prove the action of the board of equalization in fixing or determining the valuation of property for tax purposes was unauthorized by or contrary to the constitutional or statutory provisions governing taxation. *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988); *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987).

The improvements involved in this action are located on a 40-acre tract of land in Morrill County, Nebraska, and comprise the headquarters of the Greenwood Ranch, a diversified agricultural operation of 11,011 acres. Valuation of the land is not at issue. The improvements included three houses, one double-wide trailer, one Flamingo trailer, a barn, a cattle shed, two wooden bins, a steel bin, an elevator granary with an elevator leg, a railroad caboose, a Quonset, a Morton equipment shed, and corrals.

For tax purposes, counties must assess property at its actual value. Neb. Rev. Stat. § 77-201 (Reissue 1986); *Hastings Building Co. v. Board of Equalization, supra*. Neb. Rev. Stat. § 77-112(1) (Reissue 1986) defines "actual value" as being the property's value "ascertained by using the following formula *where applicable*: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the

property." (Emphasis supplied.)

At trial, all the witnesses agreed that earning capacity was not an appropriate method to arrive at actual value for the Greenwood Ranch improvements. The property is not under zoning restrictions. Therefore, these factors were properly not taken into consideration for valuation purposes.

Both of the appraisers testifying for Greenwood Ranch were unable to find comparable sales of like property in Morrill County. One of the appraisers testified there were sales of land and improvements in nearby counties, but his references and comparisons were without detailed reference to specific sales or prices. Basically, any reference to comparable sales lacked sufficient foundation for proper comparison.

The county assessor and Greenwood Ranch's appraisers agreed that there are three recognized methods of determining actual value: (1) by capitalizing earning capacity; (2) by using comparable sales; and (3) by determining replacement cost and deducting therefrom various depreciation factors. Since there was no earning capacity and since suitable comparable sales were not available, the only appraisal method that could be used was replacement cost less depreciation.

Where the evidence shows the assessed value of property has been determined by a formula in substantial compliance with Neb. Rev. Stat. § 77-112, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to the valuation. *Lexington Building Co., Inc. v. Board of Equalization*, 186 Neb. 821, 187 N.W.2d 94 (1971); *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

For the 1986 tax year, with the formula in § 77-112(1) she found applicable, the county assessor first determined replacement cost for improvements on land in Morrill County. In doing so, she utilized the Marshall Valuation Service and Residential Cost Handbook (Marshall-Swift manual) as prescribed by the Nebraska Department of Revenue. Under this method, the replacement cost is determined based upon measurements and the grade of the buildings. After that cost is fixed, the assessor determines the depreciation factors

applicable in the area and applies these to the specific property being valued.

The records of the Morrill County assessor's office reflected the measurements for all buildings on the Greenwood Ranch land. Based on those measurements and the grading determined through visual inspection, the assessor determined the replacement cost of Greenwood Ranch's improvements. To arrive at the tax valuation, the assessor then adjusted the replacement cost to reflect applicable depreciation factors. On the houses and trailers, the assessor allowed a 25 percent depreciation factor for location and allowed physical depreciation in amounts ranging from 10 percent on the owner's home, which had been remodeled, to 50 percent on the Flamingo trailer. On the other buildings, the assessor allowed a 10 percent depreciation factor for location, and physical depreciation ranging from 5 percent on the Morton building to 50 percent on the elevator leg. No functional depreciation was taken, except to exclude from valuation the loft portion of the barn and the elevator portion of the granary. The assessor valued the improvements for 1986 tax purposes at $170,820.

The evidence presented at trial shows in arriving at the assessed valuation, the assessor considered replacement cost, physical depreciation, relative location, functional depreciation, and the local market. Department of Revenue surveys showed improvements in Morrill County were assessed at approximately 70 percent of the actual selling price.

The Board reduced the assessor's valuation to $170,355, based upon suggestions made by Tim Rounds, who inspected the property on behalf of the Board.

The evidence presented by Greenwood Ranch did not dispute the method which the Morrill County assessor used. Rather, the dispute between the witnesses for Greenwood Ranch and those in favor of the assessor's valuation primarily centered on the proper amount of depreciation to be deducted from the replacement cost. As such, the dispute involves a difference of opinion as to valuation; it does not show the defendant used an improper method of determining actual value.

Greenwood Ranch failed to show the method used by the assessor and the Board was unauthorized by or contrary to the

constitutional and statutory provisions governing taxation. Therefore, the trial court was correct in affirming the board of equalization's valuation. Greenwood Ranch never overcame the presumption in favor of the Board set forth in *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982).

Greenwood Ranch also claims the trial court erred in allowing Rounds to testify concerning the equalization of the valuation across the county. Greenwood Ranch claims that testimony of Rounds was irrelevant to the issue before the court, which was the actual value of the improvements. Greenwood Ranch allowed the assessor to testify without objection as to the equalization of values throughout the county. Where the testimony objected to is substantially similar to evidence admitted without objection, no prejudicial error has occurred. *White v. Lovgren*, 222 Neb. 771, 387 N.W.2d 483 (1986); *In re Estate of Hill*, 214 Neb. 702, 335 N.W.2d 750 (1983).

For the foregoing reasons, we affirm the valuation placed upon the Greenwood Ranch improvements by the Morrill County Board of Equalization.

AFFIRMED.

BOSLAUGH, J., dissenting.

The property owner's complaint in this case was that the improvements on the property were assessed at a value in excess of their actual value. For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Many elements enter into the determination of actual value, some of which are set out in Neb. Rev. Stat. § 77-201 (Reissue 1986). *Gradoville v. Board of Equalization*, 207 Neb. 615, 301 N.W.2d 62 (1981).

The record shows that the improvements were assessed on a cost of reproduction basis less depreciation as prescribed by the Marshall-Swift manual. Such a procedure may or may not result in an assessment at actual value. The testimony of the assessor and Tim Rounds, the expert employed by the appellee, shows that no effort was made to correlate the values arrived at through the cost of reproduction less depreciation method with the actual value of the improvements. In fact, the assessor

admitted that some of the buildings were probably valued higher than it would cost to buy them in the market. The substance of the testimony of the assessor and Rounds was that the taxpayer had been treated fairly and that values throughout the county were equalized.

The owner produced the testimony of two expert real estate appraisers. They testified that in their respective opinions the improvements had a market value of $65,000 and $87,200—as contrasted with the value of $170,355 set by the board of equalization. I think it is apparent from the record that the appraisal method used by the assessor failed to allow adequate functional depreciation, which resulted in an assessment far in excess of the market value of the improvements.

The president of the corporate owner of the property and the tenant operating the improvements testified that many of the improvements were not usable. One house was originally an old Army barracks, converted into a home. Some of the floor joists of this building were rotted. It was not occupied as a residence, but was being used as an office. It was valued at $23,414. A trailer house on the property, valued at $6,900, was actually sold in December 1986 for $1,500. The caboose, valued at $3,526, was placed on the property only for aesthetic purposes and was not being used.

The barn roof leaked badly and was therefore unusable for storage. The barn, which was valued at $12,532, was used only to tie up a few horses and as a place to saddle them. A shed used to store machinery was in such poor condition that during a snowstorm in 1987, 80 percent of the building caved in. Before it fell down, it had been assessed at $1,040. A granary, assessed at $13,482, could not be used for any extended storage of grain because it was not weathertight. The lessee of the ranch testified that because of the capacity of the mill and the storage facilities on the property, they were of no use to him because they were too small for the size of his feeding operation or a feeding operation that would be economically feasible. The three grain bins were in poor shape and could not be used for storage for extended periods. The Quonset was used for machinery storage, but could not be used for grain storage because it leaked. The Morton steel building was the newest and most

useful building on the property.

In my opinion, the evidence was such that on trial de novo, the actual value of the improvements should be determined to be $87,200.

IN RE ESTATE OF ORA A. CHANEY, DECEASED. DOUGLAS CHANEY ET AL., APPELLANTS, V. LYLE J. KOENIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF ORA A. CHANEY, DECEASED, APPELLEE.

439 N.W.2d 764

Filed May 12, 1989. No. 87-561.

1. **Trusts: Decedents' Estates: Claims.** An action to recover specific trust property, or its traceable product, from a decedent's estate is not a claim under Neb. Rev. Stat. § 30-2209(4) (Reissue 1985) and need not be filed as a claim against the estate.
2. **Decedents' Estates: Notice: Due Process.** During an estate proceeding, where the probate court is petitioned to settle "demands or disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate," as provided in Neb. Rev. Stat. § 30-2209(4) (Reissue 1985), the probate court shall determine the relief sought only after providing notice and appropriate due process to other persons claiming, or having an interest in, such assets.
3. **Judges: Witnesses.** The functions of a judge and a witness are incompatible, and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Terry R. Wittler and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

No appearance for appellee.

John H. Bernstein, Terry L. Fredricks, and Steven J. Kahler, of Dixon & Dixon, P.C., and David A. Beck for creditor Federal Deposit Insurance Corporation.

Daniel E. Bryan, of Heinisch & Bryan Law Office, for creditor Geneva State Bank.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

GRANT, J.

This is an appeal from the district court for Fillmore County. Petitioners-appellants Douglas Chaney and Michael Chaney are the two beneficiaries of the Ruth Chaney James testamentary trust. Petitioner-appellant Daniel R. Stogsdill is the successor trustee of the trust. He succeeded to the office of trustee after the death of Ora A. Chaney, who had been named trustee in James' will. A "Stipulation and Joint Motion" was executed by Stogsdill, as representative of Douglas and Michael Chaney, and Lyle J. Koenig, as personal representative of the Ora Chaney estate, and filed in the estate case of Ora Chaney, case No. 7448, in the county court for Fillmore County. In that document, among other motions made and facts stipulated to, the beneficiaries moved that Stogsdill be named successor trustee. Apparently, the county court made that requested appointment. On July 30, 1986, appellants filed a second amended petition in the Fillmore County Court, also in case No. 7448, seeking to recover trust funds held by the decedent, Ora Chaney, the original trustee, on a "swollen assets" theory.

After a hearing on October 14, 1986, the county court ordered Koenig, as personal representative of the Ora Chaney estate, to deliver to Stogsdill, the successor trustee, "all identifiable trust property currently in his [Koenig's] possession" and "other such trust property which he may later have in his possession or which becomes strictly identifiable." The county court found that, as of October 14, 1986, such identifiable trust property consisted exclusively of three debentures and sustained a "Motion to Dismiss against the Petitioners' causes of action for wrongful commingling of trust assets and improper administration of trust assets filed as set out in their second amended petition . . . ."

The beneficiaries and successor trustee appealed, and, after a hearing, the district court affirmed the decision of the county court. Appellants timely appealed to this court, assigning as error the actions of the district court (1) in affirming the decision of the county court, which dismissed the second

amended petition, and (2) in failing to reverse the county court's order on the ground that the county judge considered matters outside the record in reaching his decision. The general allegation of error in the first assignment does not specify the errors in the decision made by the county court, which was affirmed by the district court. We remand for further proceedings.

The record shows the following. James, the great-aunt of the two beneficiaries, died testate on July 2, 1976. Her will established a testamentary trust and named her brother, Ora Chaney, as trustee. The trust provided for the benefit of the beneficiaries, who were to receive their distributive shares when reaching age 35. Douglas Chaney was 30 years old and Michael Chaney was 35 years old in 1986, when the stipulation above-referred-to was filed.

On March 23, 1978, Ora Chaney executed an "Acceptance of Trusteeship," which was filed in the Fillmore County Court in case No. 6692, apparently entitled "In the Matter of the Testamentary Trust Created by the Last Will and Testament of Ruth Chaney James, Deceased." In this document, Ora Chaney accepted the duties of trustee, agreed to accept the provisions of the trust as set forth in the last will and testament of James, and "[submitted] personally to the jurisdiction of [the county court] in any proceeding pursuant to Nebraska probate Code Section 30-2806 in any matter relating to the trust."

On the same day, Ora Chaney executed a "Receipt," which was filed in "In the Matter of the Estate of Ruth Chaney James, Deceased." This receipt showed the following:

> Received of Helen H. Cellar, Executrix of the Estate of Ruth Chaney James, Deceased, the following described property:
>
> | | |
> |---|---|
> | Balance of cash on hand | $ 3,212.55 |
> | Savings Account, Geneva, State Bank, Geneva, Nebraska #3995 Balance on date of death $22,262.92 - balance on March 22, 1978 | $24,315.69 |
> | Note dated May 14, 1975 to Ruth James from Ora Chaney in the sum of $10,000.00 due May 14, 1976 with 8 1/2% interest no endorsement of interest paid | $10,000.00 |

Household Finance Corporation 9% Debenture, Series 3F, due July 1, 2000 dated Febr. 1, 1976 interest paid semi-annually January 1 and July 1	$ 5,000.00
Bank America Realty Investors 6¾% Convertible Subordinate Debenture due 1990 dated August 24, 1970 Interest paid semi-annually January 15 and July 15	$ 1,500.00
American Telephone & Telegraph Company Thirty year 8¾% Debenture due May 15, 2000 dated May 18, 1970 #8010-7281 Interest paid semi-annually May 15 and November 15	$ 400.00

Pursuant to the standards set forth in Neb. Rev. Stat. § 30-2806(4)(b) (Reissue 1985), Ora Chaney posted no bond, and the administration of the trust proceeded "expeditiously . . . free of judicial intervention and without order, approval or other action of any court . . . ." Ora Chaney filed no reports during the 6 years he served as trustee. The record contains no further filings concerning case No. 6692, but it appears from some evidence and many remarks of counsel during the October 14 hearing that on April 4, 1978, Ora obtained three money orders totaling $27,500. The receipts for the money orders indicated that $23,500 was transferred to Richard Chaney (Ora Chaney's son and the beneficiaries' father), and $2,000 was given to each of the beneficiaries. Such actions, of course, completely violated the terms of the trust Ora Chaney had accepted 12 days before.

Statements of counsel in the record indicate that in return for the funds he received, Richard Chaney executed and delivered a mortgage granting Ora Chaney, as trustee, a second lien on certain real estate. Douglas and Michael Chaney testified during a July 1986 hearing that they each received an additional amount of $1,258 from Ora between 1978 and 1983. This amount apparently represents interest on the three debentures.

Ora Chaney died testate on March 20, 1984, and appellee, Koenig, was appointed personal representative of his estate in November of 1984. Pursuant to his duties as personal representative, Koenig caused a "Notice to Creditors" to be

published. According to a brief filed on behalf of appellee, the March 14, 1985, notice stated that the last day for filing claims against the Ora Chaney estate was May 16, 1985.

On May 1, 1985, Michael Chaney filed an undetailed general claim against the estate in the amount of $43,188.89. This claim was uncontested. Douglas Chaney filed a general claim against the estate on August 2, 1985, in the amount of $20,000. Koenig objected to this claim as untimely. The county court expressly declined to rule on the merits of these claims during the hearings in this matter, but Stogsdill informed the county court that the general claims had "really merged into this Petition."

Although the original filing date does not appear in the record, briefs filed on behalf of the appellee indicate that this action began on March 14, 1986. On July 21, 1986, the county court held a hearing on the beneficiaries' first amended petition. At this hearing, the county court asserted exclusive jurisdiction over the matter. The "Stipulation and Joint Motion" executed by Koenig, as personal representative, and Stogsdill, on behalf of the beneficiaries, was received in evidence.

The stipulation stated that the trust had been established; that Ora Chaney had administered the trust; that as a result of Ora Chaney's administration, at the time of the stipulation the trust res consisted exclusively of the noncash trust property and the interests of the beneficiaries in the Ora Chaney estate; that the beneficiaries sustained a loss as a result of Ora Chaney's administration of the trust; that the noncash trust property was in the possession of Koenig; and that the Ora Chaney estate was insolvent.

The stipulation further provided that the trust res as of March 23, 1978, included $27,528.24 in liquid assets, the $10,000 note, and the three debentures; that the liquid assets received by Ora Chaney on March 23, 1978, together with any appreciation thereon, were part of the trust res; that the trustee did not collect the $10,000 note; and that as of March 31, 1986, the total amount of principal and accrued interest on the note was $24,291.44 and was part of the trust res. The parties also stipulated that the value of the appreciated liquid assets would range from $60,968 to $155,302, depending on which of three

alternative investment portfolios was used to calculate interest.

The "Stipulation and Joint Motion" concluded as follows:

> WHEREFORE, the parties named herein jointly move, and request:
>
> (a) That the Court determine the precise value of the trust res based upon a reasonable rate of return consistent with the trustees [sic] duty of prudence, these stipulations and agreements, and after consideration of the comparison returns on trust investments contained herein;
>
> (b) That the Court determine the applicability and priority of the trust res value against the Estate of Ora A. Chaney consistent with the stipulations and agreements contained herein;
>
> (c) That the Court conduct a hearing to determine the foregoing;
>
> (d) That the Court name Daniel R. Stogsdill of Cline, Williams, Wright, Johnson & Oldfather as successor trustee of the trust;
>
> (e) That upon the completion of said hearing, the Court order the personal representative to transfer to the successor trustee the property and money described heretofore and order the successor trustee to manage and distribute these assets consistent with the terms of the testamentary trust of Ruth Chaney James less any amounts which the Court may determine are properly owed the estate by Michael Chaney or Douglas Chaney, respectively; and
>
> (f) That the Court order such other and further relief as the court deems just and equitable in the premises.

After the hearing of July 21, 1986, the county court, among other orders, appointed Stogsdill as successor trustee of the James testamentary trust. We thus encounter the first of the procedural problems that infest this entire proceeding. The Ruth Chaney James testamentary trust, case No. 6692, and the Ora A. Chaney estate, case No. 7448, are two entirely separate cases. A successor trustee should be appointed in the trust case, and that trustee could then bring whatever action is necessary in the estate proceedings. That procedural flaw does not control

the disposition of the cause before us.

The county court judge noted that Koenig was the only interested party who had received notice of the July 21 hearing. After hearing argument and the testimony of Douglas Chaney, Michael Chaney, and Koenig, the judge stated that he "would really like to have another Hearing with at least the major creditors" present.

The county court's order of July 30, 1986, directed that Koenig deliver to Stogsdill, as successor trustee, "all identifiable trust property currently in his possession and . . . other such trust property which he may later have in his possession or which becomes strictly identifiable," that is, the three debentures. The court further ordered that a hearing be conducted on August 12, 1986, and that Stogsdill provide notice of the hearing to creditors of the estate. The order, drafted by counsel for the beneficiaries, reflects the beneficiaries' objection to a second hearing, but no objection was actually made during the July 21 proceedings.

A second amended petition was filed on July 30, 1986, adding the successor trustee as a named petitioner and alleging, in part, that Ora Chaney had taken possession of the trust assets and that

> 6. Ora A. Chaney died testate on March 20, 1984. Prior to his death, Ora A. Chaney had wrongfully commingled and improperly administered the property he received as Trustee from Ruth Chaney James, thus increasing his estate.
>
> . . . .
>
> 8. As a result of Ora A. Chaney's wrongful act of commingling Trust property with his own and improperly administering the Trust property, thus increasing his estate, the entire Estate of Ora A. Chaney is charged with the Trust created in the Will of Ruth Chaney James to the extent of the value of the Trust interest, including all income, appreciation and growth therefrom.

The petitioners-appellants prayed that the court (1) enjoin Koenig from making any distributions from the estate until the interests of the beneficiaries were finally determined, (2) issue an order charging the entire estate with the trust created by

James, (3) conduct a hearing to determine the extent of the petitioners' interests in the estate, and (4) order Koenig to transfer to the successor trustee the trust assets receipted by Ora Chaney on March 23, 1978, plus "[a]ll other property or money determined by the court to constitute Trust property and thus not includable in the Estate of Ora A. Chaney."

The August 12 hearing was apparently continued many times. The October 14, 1986, hearing on the second amended petition was attended by the beneficiaries' counsel; Stogsdill, as successor trustee in the James testamentary trust; Koenig, as personal representative of the Ora Chaney estate; Richard Chaney's counsel; and counsel for the Geneva State Bank and the Federal Deposit Insurance Corporation (creditors), the major creditors of the Ora Chaney estate. At this time, the appellants orally objected to the second hearing because the matter was "purely a matter between the Estate and the Trust and its beneficiaries," because the actions of the personal representative at the July 21 hearing were binding on the creditors, and because the creditors were not the real parties in interest. The court stated that the October hearing was a continuation of the July hearing, and the objection was apparently overruled.

The creditors objected to the earlier July 21 hearing, and contended they had not received notice of and should not be bound by the stipulation executed by Koenig. The creditors objected to the October 14 hearing because they had not received copies of the second amended petition, which the appellants contended was to be the subject of the hearing. Eventually, apparently, the creditors waived whatever rights they had to have copies of the petition, and the October 14 hearing proceeded.

Koenig was the only person who testified as a witness during the October 14 hearing. He testified that his investigation of the trust assets consisted of going through bank boxes and that in doing so he found the three debentures and receipts for three money orders dated April 4, 1978, indicating that $23,500 had been transferred to Richard Chaney and $2,000 to each of the beneficiaries. Koenig did not discover a segregated amount of $3,212.55 or a trust savings account at the Geneva State Bank.

Nor did Koenig find the $10,000 note or any evidence that Ora Chaney had paid the note.

Koenig further testified that he had no personal knowledge of several matters set forth in the stipulation and that he had signed the stipulation as an effort to "get the facts before the Court" so that the court could give him directions and instructions regarding this action. He stated that, in signing the stipulation, it was not his intention to bind the estate and that he did not take any position as to whether the beneficiaries were entitled to priority funds from the estate.

The county court received documents evidencing the beneficiaries' general claims against the estate, but did not rule on those claims, and sustained the creditors' objection to the stipulation.

The creditors then moved to dismiss the beneficiaries' causes of action based on commingling and improper administration of trust assets (1) because these were tort claims against the estate which had not been timely filed and were, therefore, barred by Neb. Rev. Stat. § 30-2485 (Reissue 1985), and (2) because the beneficiaries failed to state a prima facie case of commingling or improper administration of trust funds.

Noting that petition paragraph 6 alleged that Ora Chaney wrongfully commingled and improperly administered the trust property, the county judge commented, "I don't think anybody that knew Mr. Chaney, would infer the fact that he wrongfully took the assets and put them in his own Estate. I don't know as though he enhanced his Estate during the period when this Estate was going down." The judge "reaffirmed" his ruling on the first petition, but stated that the beneficiaries were entitled to the $10,000 note if they could find it.

The county court's order of October 17, 1986, directed Koenig to deliver to Stogsdill "all identifiable trust property currently in his possession and [to] deliver other such trust property which he may later have in his possession or which becomes strictly identifiable." As of October 17, the identifiable trust property was only the three debentures.

The October 17 order further stated: "2. The Court sustains the Motion to Dismiss against the Petitioners' causes of action for wrongful commingling of trust assets and improper

administration of trust assets filed as set out in their second amended petition and dismisses their action."

On appeal, the district court received into evidence, without objection, the county court transcript and bill of exceptions as to both the July 21 and October 14 hearings. No other evidence was presented to the district court. In affirming the decision of the county court, the district judge concluded:

> There is evidence that the cash and savings account delivered to the trustee was distributed to the beneficiaries and their father. The evidence is that the beneficiaries were adults from the beginning of the trust. There is evidence that the income from the debentures was distributed to the beneficiaries. The [personal representative] found no note with the debentures. No one seems to have made a search of any bank records. The beneficiaries seem to indicate that they do not know anything about all these matters but the county court judge is not required to believe their testimony. The trustee was the grandfather of the beneficiaries. While this Court believes in the theory or doctrine of swollen assets, these facts do not provide a basis for its application.

We review this case, as did the district court, for error appearing on the record. *In re Estate of Miller,* 231 Neb. 723, 437 N.W.2d 793 (1989); *In re Estate of Reimer,* 229 Neb. 406, 427 N.W.2d 293 (1988).

Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 1986) provides that each county court shall have "[e]xclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof." Neb. Rev. Stat. § 30-2210 (Reissue 1985) states that, except as otherwise provided, the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1985 & Cum. Supp. 1986), applies to "(1) the affairs and estates of decedents . . . and (5) trusts subject to administration in this state." Section 30-2211 (Reissue 1985) further provides that, to the full extent permitted by the Constitution of Nebraska, the county court has jurisdiction over all subject matter relating to "(1) estates of decedents . . . and (3) trusts." Appellants chose to file this matter in the county court, and we determine that the action

was properly filed in the county court and must conform with the provisions of the Nebraska Probate Code.

The nonclaim statute, § 30-2485, provides:

> (a) All claims against a decedent's estate which arose before the death of the decedent . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with section 30-2483; *Provided*. . . .

Section 30-2209(4) (Reissue 1985) provides:

> Claims, in respect to estates of decedents . . . includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

The record shows that Koenig, as personal representative, is the only proper appellee in this case. Koenig did not file a brief with this court; however, counsel for the Geneva State Bank and the Federal Deposit Insurance Corporation filed briefs in this appeal presenting issues contended by the creditors and, we presume, by Koenig.

The briefs filed on behalf of appellee claim that, to the extent appellants' second amended petition states causes of action based on commingling or misappropriation of trust funds, those causes of action are tort claims which were not timely presented and are, consequently, barred under § 30-2485. Appellants contend this action is a dispute regarding the title of the decedent, Ora Chaney, to "specific assets alleged to be included in the estate" and need not be filed as a claim against

the estate.

There are two types of remedies available to a beneficiary who seeks to recover trust property from a trustee. This case is further complicated by the fact that the trustee is deceased. Generally speaking, the beneficiary may elect to either (1) establish liability for breach of trust and obtain a judgment against the individual trustee or (2) recover the trust property or its product. Through their second amended petition, the beneficiaries elected the latter remedy of tracing, seeking to recover identifiable trust assets or the product of trust property.

In *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984), we held that the county court had jurisdiction to determine whether certain property belonged to a decedent's estate and that such an action was not a claim under § 30-2209(4). "It is clear beyond question that the action here involved a dispute regarding title of property allegedly belonging to the decedent and included in her estate, and was not a claim. The county court, however, did have jurisdiction to determine whether the property properly belonged to the estate." *Severns, supra* at 805, 352 N.W.2d at 868. Similarly, we hold that this action to recover specific trust property, or its traceable product, from a decedent's estate is not a claim under § 30-2209(4) and need not be filed as a claim against the estate. Therefore, this action was not barred by the nonclaim statute, § 30-2485.

This type of action, however, is an adversary proceeding to which the rules of civil procedure apply. See Neb. Rev. Stat. § 24-528 (Reissue 1985). Due to numerous procedural irregularities in the county court and the actions of the county judge who tried this matter, we determine that appellants did not receive a full, fair hearing on all the issues they have presented. We determine there is no dispute as to part of the trust assets recovered by appellants. We therefore affirm in part and remand for further proceedings as to part of appellants' contentions.

The irregularities began with the motion of the petitioners-appellants to have Stogsdill appointed as a successor trustee in the James testamentary trust, apparently case No. 6692, by a pleading filed in the Ora Chaney estate case.

No prejudice resulted, however, and we consider Stogsdill as the successor trustee.

Next, no notice of the July 21 hearing was given to the creditors of the Ora Chaney estate. This is a proceeding under § 30-2405 (Reissue 1985), which provides:

> Persons interested in decedents' estates . . . may petition the court for orders in formal proceedings within the court's jurisdiction . . . . The court has jurisdiction of all proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed.

Section 30-2406 (Reissue 1985), further, provides:

> In proceedings within the jurisdiction of the court where notice is required by this code or by rule, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with section 30-2220. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

In this case, the successor trustee, while he is seeking relief against his predecessor trustee and is trying to establish the wrongs committed by that trustee, cannot bring an action under § 30-2806, but, instead, since the predecessor trustee is dead, must turn to the estate of that trustee. It is in the estate proceeding that the successor trustee must establish how, and to what extent, the deceased trustee has wronged the beneficiaries. In so acting, the successor trustee is faced with many procedural problems. Whether the successor trustee is seeking relief by filing a claim against the decedent's estate or in a proceeding outside the claim procedure (such as generally described in *Severns, supra*), he must give notice as required by § 30-2220 (Reissue 1985) to interested persons.

"Interested person" is defined in § 30-2209(21) to include "heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent . . . which may be affected by the proceeding."

Section 30-2220(a) provides:

> If notice of a hearing on any petition is required and

> except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney.

Finally, § 30-2222 (Reissue 1985) provides:

> In formal proceedings involving trusts or estates of decedents . . . the following apply:
>
> . . . .
>
> (2) Persons are bound by orders binding others in the following cases:
>
> . . . .
>
> (ii) To the extent there is no conflict of interest between them or among persons represented . . . orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. . . .
>
> . . . .
>
> (3) Notice is required as follows:
>
> (i) Notice as prescribed by section 30-2220 shall be given to every interested person or to one who can bind an interested person as described . . . above.

Under § 30-2222(2)(ii), Koenig, as personal representative, had the authority to bind the creditors with respect to the undistributed assets of the Ora Chaney estate, but only to the extent there was no conflict of interest between Koenig and the creditors. We note that Koenig filed no responsive pleadings in this action, but instead executed a stipulation and joint motion. Some of the terms of that document were clearly incompatible with the interests of the creditors. In light of these circumstances, the July hearing was a nullity, and the county court's order of July 30, 1986, properly directed Stogsdill to provide notice of hearing to creditors of the estate.

The mere presence of counsel for the creditors at the October hearing, however, did not make the creditors parties to the lawsuit. This problem is significant because the motion to dismiss the second amended petition for failure to prove a prima facie case was made by the creditors. Such a motion must be made by a party.

It might be consistent with Koenig's position in this matter (that he did not take any position as to whether the beneficiaries were entitled to priority funds from the estate) for him to attempt to interplead the creditors, pursuant to Neb. Rev. Stat. § 25-325 (Reissue 1985), to the extent the beneficiaries seek "the recovery of personal property" and the creditors, without collusion with Koenig, "[have] or [make] a claim to the subject of the action." Koenig did not pursue this avenue.

Neb. Rev. Stat. § 25-323 (Reissue 1985) provides:

> The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

The county court did not so order.

The creditors also might attempt to intervene in the action. Neb. Rev. Stat. § 25-328 (Reissue 1985) provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

The record contains no petition in intervention. See Neb. Rev. Stat. § 25-330 (Reissue 1985).

Similarly, the record gives no indication that Richard Chaney had standing to participate as a party to the October 14 proceedings, but his attorney fully participated in those proceedings.

A motion to dismiss for failure to prove a prima facie case should be treated as a motion for directed verdict, which must be made by a party to the action. The county court erred in entertaining the creditors' motion to dismiss, without some

form of contested proceeding which this court can review.

The overall thrust of what we are trying to set out in this case is that there are many problems arising within an estate proceeding which cannot be disposed of by the granting or disallowing of claims. When such matters are present within an estate proceeding, the Nebraska Probate Code states that petitions seeking formal orders of the court may be filed. We are unable to find in the code any procedural rules regarding the determination of such petitions, nor are we directed to any code provisions. In such a situation, we turn to § 24-528, which provides:

> All provisions in the codes of criminal and civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically governing procedure in county courts and related to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court.

Before an order may be entered pursuant to a petition, it would appear that adverse parties should be notified. The county court could then determine if the persons notified want to enter the case and, if so, if they should be permitted to appear in the case. The court could then require pleadings to be filed in response to the petition and then have a hearing on the issues, which could be presented to the court by parties interested in a certain result. In other words, an ordinary adversarial trial could be conducted on the issues before the court.

We determine that during an estate proceeding, where the probate court is petitioned to settle "demands or disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate," as provided in § 30-2209(4), the probate court shall determine the relief sought only after providing notice and appropriate due process to other persons claiming, or having an interest in, such assets.

Such a procedure is far removed from the procedures followed in this case, and the difference is predicated on notice and some formal procedure. It must be remembered that the advent of the Nebraska Probate Code, as much as that code sought to speed up procedures, did not result in the abrogation

of the due process clauses of the U.S. and Nebraska Constitutions. An approach without notice may result in an approach adopted by appellants, as set out in their brief at 24:

> To the extent that the creditors feel that Mr. Koenig erred in executing the stipulation and joint motion, their remedy lies in bringing an action against Mr. Koenig for breach of his statutory duties rather than attempting to impeach the stipulation, which Mr. Koenig clearly had the power to make.

It would appear that appellants contend for the position that all interested persons could have ex parte hearings based on whatever agreement the parties could reach with the personal representative. Then, if the personal representative makes any mistake, parties who were damaged could sue the personal representative. Such procedure cannot be for the good of those governed by the probate code.

Because this cause is to be remanded, we also will discuss appellants' contention that they should be able to recover commingled or misappropriated trust property from the Ora Chaney estate on a "swollen assets" theory.

In general, a beneficiary seeking to trace trust funds must prove that the property sought either is part or all of the original trust property, or has been produced by the original trust res through sale, exchange, reinvestment, receipt of income or profits, or some other process. See G. Bogert & G. Bogert, The Law of Trusts and Trustees § 921 (rev. 2d ed. 1982), citing *Central Nat. Bank v. First Nat. Bank*, 117 Neb. 161, 219 N.W. 894 (1928).

> The generally adopted view denies the remedy of tracing where the proof of the beneficiary-claimant merely shows the receipt of trust property by the defendant and makes no case as to its subsequent history or its existence among the present assets of the defendant, and also where the evidence shows that the trust property has been disposed of in such a way as to leave no product.

G. Bogert & G. Bogert, *supra* at 367-69, citing *State, ex rel. Sorensen, v. Nebraska State Savings Bank*, 127 Neb. 832, 257 N.W. 64 (1934). The basis of this rule is that the beneficiary's right to a priority distribution is based on ownership of some

specific fund or assets, or on a claim or charge upon all the fund or assets, because the trust property is contained in or has contributed to them. See *City of Lincoln v. Morrison,* 64 Neb. 822, 90 N.W. 905 (1902). However, if the trustee destroys a trust fund by dissipating it altogether, without ever placing the fund in the trustee's personal funds, there remains nothing to be the subject of a trust, and the beneficiary has no specific claim against any property or fund, but is merely a creditor of the trustee. *Id.*

The "swollen assets" doctrine operates as an exception to the strict identification rule. For example, when a trustee has paid his own creditors with trust funds, there should not be a tracing because the transaction does not produce any property or product to be traced. The swollen assets doctrine, however, allows a beneficiary to trace into the estate of an insolvent trustee on the theory that the use of trust funds to pay the personal debts of the trustee relieved him from using his individual property for that purpose and consequently increased the amount of it on hand at insolvency. Thus, it could be said that using trust funds to pay personal debts had increased the assets on hand at the time of determining the rights of creditors and other claimants to the trustee's estate. See, generally, *City of Lincoln v. Morrison, supra*; G. Bogert & G. Bogert, *supra*, § 922.

While this court has on occasion employed the swollen assets doctrine, see *State, ex rel. Sorensen, v. Farmers State Bank*, 121 Neb. 532, 237 N.W. 857 (1931), we decline to do so in matters implicating the portion of Nebraska Probate Code, § 30-2209(4), which provides that the term "claim" does not include a dispute regarding title of a decedent to specific assets alleged to be included in the estate. A swollen assets theory of recovery, by its very nature, does not implicate "specific assets." A beneficiary seeking to recover trust property, or its product, from a decedent's estate must trace the trust property to a specific fund or asset which is included in the estate. In other words, to obtain a preference, appellants must show that the Ora Chaney estate actually was increased by the misappropriation or commingling of their trust property. They are entitled to a preference to the extent of such increase only.

See *City of Lincoln v. Morrison, supra.*

The record indicates that the three debentures constituting original trust assets were properly traced, and the county court correctly ordered Koenig to deliver the debentures to the successor trustee. Appellants are entitled to interest paid on the debentures, less amounts already received, provided they trace the interest transactions in a manner consistent with that outlined in *City of Lincoln v. Morrison, supra.*

Similarly, appellants are entitled to the $10,000 note, if it can be found, or to attempt to prove the proceeds of the note can be identified in Ora Chaney's estate.

Although the record is inconclusive on this point, it does not appear at this stage of the litigation that the Ora Chaney estate was increased by Ora Chaney's disposition of the liquid assets of the trust. Koenig's testimony was that he did not discover a segregated amount of $3,212.55 or a savings account at the Geneva State Bank. To the contrary, the record suggests that on April 4, 1978, Ora Chaney disposed of the liquid assets by distributing $2,000 to Michael Chaney, $2,000 to Douglas Chaney, and $23,500 to their father, Richard Chaney, in return for a second mortgage on real estate. Richard Chaney was not called on to testify in the October hearing. In the sketchy record before us, it would appear that the assets which Ora Chaney received as trustee were not channeled into his personal bank account, but were immediately given to others. If that turns out to be the fact, such action was wrongful, but did not increase Ora Chaney's estate.

Nonetheless, appellants are entitled to a chance to prove their theory that the James trust assets can be traced into the Ora Chaney estate. The record is replete with remarks by the county judge which reflect his personal knowledge of the affairs of the decedent, the beneficiaries, James, and other members of the Chaney family. The judge's comments, "I don't think anybody that knew Mr. Chaney, would infer the fact that he wrongfully took the assets and put them in his own Estate," and "I don't know as though he enhanced his Estate during the period when this Estate was going down," were improper and demonstrate that appellants did not receive an impartial hearing on the second amended petition. Such remarks also indicate that the

county judge's rulings were based on factual information possessed by the judge. We stated in *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 244, 313 N.W.2d 667, 671 (1981), "The functions of a judge and a witness are incompatible and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time." See, also, *Franks v. Franks*, 181 Neb. 710, 150 N.W.2d 252 (1967).

To the extent they order the personal representative of the Ora Chaney estate to deliver the named debentures, which are specific identifiable trust assets of the James trust, to the successor trustee, the decisions below are affirmed, since the creditors were present at the October 14, 1986, hearing and neither they nor the appellee complained in that hearing, or on this appeal, as to that part of the county court's order. The action must be remanded for a proper hearing to determine whether the other assets of the trust can be traced to property currently in the possession of the personal representative of the estate. Each party shall pay the costs incurred herein by such party.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RICHARD E. DONALDSON AND DORCAS DONALDSON, HUSBAND AND WIFE, APPELLEES, V. FARM BUREAU LIFE INSURANCE COMPANY, APPELLANT.

440 N.W.2d 187

Filed May 12, 1989. No. 87-648.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985) is sui generis.
2. _____. Whether an action for declaratory judgment is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
3. **Contracts.** An action seeking a declaration that a contract exists is treated as an action at law.
4. **Declaratory Judgments: Appeal and Error.** The Nebraska Supreme Court treats the determination of factual issues in an action seeking a declaration that a

contract exists, tried without a jury, in the same manner as any other action at law; accordingly, in such an action, the findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.

5. **Appeal and Error.** Regardless of the scope of its review regarding questions of fact, the Nebraska Supreme Court has an obligation to reach an independent conclusion concerning questions of law.
6. **Contracts: Words and Phrases.** In contract law a condition precedent is a fact which must come into existence or an event which must take place before a right to performance arises.
7. **Contracts.** Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
8. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
9. **Contracts: Time.** Time is not of the essence when a contract does not expressly so provide and the conduct of the parties shows they do not so consider it.
10. **Contracts: Time: Presumptions.** Where a contract is silent with respect to the time of performance, a reasonable time will be presumed or implied by law.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with direction.

Marvin O. Kieckhafer, of Kay and Kay, for appellant.

Donald W. Pederson and Terrance O. Waite, of Murphy, Pederson, Piccolo & Pederson, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiffs-appellees, Richard E. Donaldson, a physician, and his wife, Dorcas Donaldson, a registered nurse, seek a declaration that defendant-appellant, Farm Bureau Life Insurance Company, is contractually obligated to provide them with health insurance coverage. The district court ruled that such a contract of insurance does indeed exist between the Donaldsons and Farm Bureau. Farm Bureau has appealed, asserting, in summary, that the district court erred in finding that the Donaldsons had performed all conditions precedent to the formation of the contract, thereby creating duplicate coverages. We reverse and remand with direction.

Prior to the events in question, the Donaldsons purchased

and had in force and effect health insurance coverage through a group policy issued by Blue Cross-Blue Shield of Nebraska. Because Blue Cross-Blue Shield raised its premium, Mrs. Donaldson contacted the local Farm Bureau manager and agent, Douglas Collins, with whom the Donaldsons had placed other insurance, to see if "as good a coverage for a lesser rate" could be obtained. As a consequence, Collins met with the Donaldsons at their home during the evening of February 8, 1984.

During the course of that meeting, an application for enrollment in a $500 deductible Farm Bureau group health plan was completed. The application recites that the Farm Bureau coverage was to replace a Blue Cross group policy with a like deductible and that the replacement was to take effect on March 15, 1984. The application further states that the Farm Bureau certificate was to cover Dr. Donaldson as the applicant, his wife, and his four children. At the conclusion of the meeting, both Dr. and Mrs. Donaldson signed the application, which cautions that coverage would take effect "only when the application is approved by" Farm Bureau and that a "contract will not be offered when there is other major medical or hospital surgical coverage in effect, which is not being replaced, or whenever there is a duplication of benefits which would result in excessive coverage." It also appears that Dr. Donaldson paid the anticipated first month's premium.

In response, Farm Bureau prepared a certificate of insurance to become effective March 15, 1984, and forwarded it to Collins for delivery to the Donaldsons. Because the certificate was to become effective in the future, it was accompanied by a document to be signed by Dr. Donaldson attesting that the insurability of those proposed for coverage had not changed and that there had been no medical treatment since the date of the original application except for such treatment as might be detailed in the attestation document described above. Farm Bureau also prepared and forwarded to Collins a delivery memorandum which directed Collins to deliver the policy only if he collected an additional sum, as the monthly premium was somewhat higher than anticipated, and the previously described attestation document was executed. The delivery memorandum

advised that the certificate was not in force, and instructed that it not be delivered if there had been a change in insurability since the date of the original application. If no change in insurability had occurred, the coverage would be in force upon obtaining the attestation of continued insurability. The delivery memorandum also limited the delivery period to April 8, 1984, instructing Collins not to deliver the certificate after that date unless authorized to do so by Farm Bureau's underwriting department.

On February 28, 1984, Collins wrote the Donaldsons a letter which stated that their application for insurance had been approved, and identified the certificate number Farm Bureau had assigned. The letter also advised that the "effective date of this new policy is March 15, 1984. You may wish to make arrangements of previous policies around this date." The letter further advised:

> The above application has been approved for issue and the certificate will be mailed to you a week before the effective date of 3/15/84 .
>
> This approval is subject to the continuing insurability of all persons proposed for coverage at the time this certificate is delivered.
>
> UNDERWRITING DEPARTMENT

Notwithstanding the representation in the letter that the certificate would be mailed, Collins testified it was both his personal policy and that of Farm Bureau that certificates evidencing coverage be delivered in person. This personal service enabled him to discuss the coverage, answer questions, and obtain the execution of such other documents as might be required. However, Collins did not succeed in making contact with the Donaldsons to effect delivery of the policy and obtain execution of the attestation of continued insurability, and Farm Bureau ultimately treated the transaction as one in which a policy had not been issued. Farm Bureau issued a check to Dr. Donaldson returning the amount he had paid toward the first month's premium, but Dr. Donaldson has not cashed the check. So far as the record reveals, the Donaldsons tendered no further premiums to Farm Bureau.

The Donaldsons did not cancel the Blue Cross-Blue Shield

coverage as of March 15, 1984. In fact, the Blue Cross-Blue Shield premiums were paid without interruption, so that there has been continuous Blue Cross-Blue Shield coverage at least through April 21, 1987, the date of the district court trial. Mrs. Donaldson testified that while she did not intend to obtain double coverage, she also did not intend to terminate the Blue Cross-Blue Shield coverage until the end of March, as she wanted a 15-day overlap in coverage. Mrs. Donaldson explained that the April Blue Cross-Blue Shield premium was paid through "our secretary" toward the end of March. When asked whether such payment "turn[ed] out to be a mix-up," Mrs. Donaldson replied that it "turned out to be a godsend."

During the third week of March 1984, examination revealed a half-centimeter calcification in Mrs. Donaldson's right breast of a nature that could not be felt except as she lay on a hard x-ray table. A biopsy of the calcification was done on Thursday of that week. On or about the first of April, Mrs. Donaldson was told the biopsy revealed the presence of cancer and that she was in need of immediate surgery. Surgery was performed a few days later.

Regardless of the fact that Collins' February 28 letter advised the Donaldsons as to the certificate number Farm Bureau had assigned, Mrs. Donaldson called Collins' office when she entered the hospital for the biopsy, variously described as between March 20 and March 27, to obtain that information. Sometime later in April, Mrs. Donaldson learned that Blue Cross-Blue Shield had paid the hospital bills and that Farm Bureau had not. Dr. Donaldson underwent a heart transplant on October 14, 1986.

An action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985) is sui generis, *Buhrmann v. Buhrmann,* 231 Neb. 831, 438 N.W.2d 481 (1989), and *Caeli Assoc. v. Firestone Tire & Rubber Co.,* 226 Neb. 752, 415 N.W.2d 116 (1987); whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute, *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). The essence of the dispute before us sounds in contract. That being so, the action is to be treated as one at law. *Fisbeck v. Scherbarth, Inc.*, 229

Neb. 453, 428 N.W.2d 141 (1988). See, also, *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). This court treats the determination of factual issues in such a declaratory judgment action which was tried without a jury in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988); *Beatrice Nat. Bank v. Southeast Neb. Co-op*, 230 Neb. 671, 432 N.W.2d 842 (1988). However, regardless of the scope of our review regarding questions of fact, this court has an obligation to reach an independent conclusion concerning questions of law. *Jelsma v. Scottsdale Ins. Co., supra*; *Beatrice Nat. Bank v. Southeast Neb. Co-op, supra*; *Fisbeck v. Scherbarth, Inc., supra*.

Farm Bureau claims the Donaldsons failed to meet three conditions precedent to the formation of a contract of insurance; namely, that they cancel their Blue Cross-Blue Shield coverage, be insurable at the time of the delivery of the Farm Bureau certificate, and pay the difference between the anticipated and actual first month's premium.

We have said that in the law of contracts, a " 'condition precedent' [is] a condition which must be performed before the parties' agreement becomes a binding contract, or a condition which must be fulfilled before a duty to perform an existing contract arises." *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 349, 370 N.W.2d 103, 107 (1985), citing *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947). In short, in contract law a condition precedent is a fact which must come into existence or an event which must take place before a right to performance arises.

The principle has been applied to contracts of insurance. E.g., *Hemenway v. MFA Life Ins. Co., supra* (conditions contained in "conditional receipt" met; thus, insurance coverage held to exist); *Ortega v. North American Co. for L. & H. Ins.*, 187 Neb. 569, 193 N.W.2d 254 (1971) (condition of continued insurability between time of application and delivery of policy met; thus, coverage held to exist); *Adolf v. Union Nat.*

Life Ins. Co., 170 Neb. 38, 101 N.W.2d 504 (1960) (refusal of insurer to accept risk because applicant failed to meet condition that he be insurable resulted in no contract of insurance notwithstanding insurer's acceptance of first month's premium and issuance of conditional receipt); *Hinnenkamp v. Metropolitan Life Ins. Co.*, 134 Neb. 846, 279 N.W. 784 (1938) (conditions of insurability at time of application and delivery of policy met; thus, insurance coverage held to exist); *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N.W. 624 (1936) (condition of insurability at time of delivery of policy met; thus, insurance coverage held to exist).

We have also held that where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987); *K & K Pharmacy v. Barta,* 222 Neb. 215, 382 N.W.2d 363 (1986). See *Frenzen v. Taylor, ante* p. 41, 439 N.W.2d 473 (1989).

The clear meaning of the caution included in the application signed by the Donaldsons is that Farm Bureau would not insure the Donaldsons if, among other things, such "major medical or hospital surgical coverage" the Donaldsons already had was not being replaced by the Farm Bureau certificate. While the Blue Cross-Blue Shield policy issued to the Donaldsons was not put in evidence, the record nonetheless leaves no question but that at the time the Donaldsons applied for coverage with Farm Bureau, all the parties intended that the Donaldsons were to cancel the very Blue Cross-Blue Shield policy they continued in force and that such cancellation was a condition precedent to the extending of coverage by Farm Bureau.

However, the Donaldsons in effect argue that Collins' letter waived that condition by advising them that Farm Bureau had approved their application; by promising that the certificate would be mailed the week prior to the effective date of the coverage, but not delivering the certificate at all; and by writing that they might "wish to make arrangements of previous policies around this date," rather than directing that they must effect cancellation by March 15, 1984.

Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989); *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987). We recently applied that concept to a life insurance contract in *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987), holding therein that the insurer's demand and acceptance of the succeeding month's premium with knowledge that the preceding month's premium had not been paid waived the policy provision empowering the insurer to declare a forfeiture because of the earlier nonpayment.

Obviously, if the district court were to have concluded that Farm Bureau did not waive the condition requiring cancellation of the Blue Cross-Blue Shield coverage, then judgment would have to have been entered against the Donaldsons and in favor of Farm Bureau, for the condition was not fulfilled. The evidence is such, however, that the district court as the finder of fact reasonably could find that Farm Bureau's failure through Collins to mail or otherwise deliver the certificate during the week preceding March 15, 1984, and Collins' advice that the Donaldsons might "wish to make arrangements of previous policies around" March 15, waived that date as the precise day by which cancellation must have been effected, for time is not of the essence when a contract does not expressly so provide and the conduct of the parties shows they do not so consider it. *Able Electric Co. v. Vacanti & Randazzo Constr. Co.*, 212 Neb. 619, 324 N.W.2d 667 (1982); *Richards v. Bycroft*, 197 Neb. 478, 249 N.W.2d 743 (1977). The district court was clearly wrong, however, in its implicit finding that Farm Bureau's failure to deliver the certificate and Collins' choice of language as to when cancellation must have been accomplished waived the condition in its entirety, for there is nothing in the record which supports a finding that Farm Bureau intentionally relinquished the requirement that the existing Blue Cross-Blue Shield coverage be canceled, or which establishes conduct which warrants an inference of such relinquishment. As we have recently said, in order to establish a waiver of a legal right, there

must be clear, unequivocal, and decisive action showing such a purpose, or acts amounting to an estoppel. *Jelsma v. Scottsdale Ins. Co., supra.* Given the language of the application, the clear import of Collins' February 28 letter is that Farm Bureau's acceptance of the Donaldsons' offer to purchase insurance, *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982), was contingent upon the cancellation of the existing Blue Cross-Blue Shield coverage. The evidence and conduct of Farm Bureau establishes only that it waived March 15, 1984, as the precise date by which the Donaldsons were required to cancel their Blue Cross-Blue Shield coverage. Where a contract is silent with respect to the time of performance, a reasonable time for performance will be presumed or implied by law. *Gustav Thieszen Irr. Co., Inc. v. Meinberg*, 202 Neb. 666, 276 N.W.2d 664 (1979). See, also, *Frenzen v. Taylor, ante* p. 41, 439 N.W.2d 473 (1989). Thus, the Donaldsons had a reasonable time within which to perform that condition precedent. Whatever a reasonable time might be, it is not as long as the 3 years the Donaldsons continued their Blue Cross-Blue Shield coverage.

The foregoing analysis makes a consideration of the remaining claims of Farm Bureau unnecessary.

The judgment of the district court is reversed and the cause remanded with the direction that the Donaldsons' petition be dismissed.

REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., dissenting.

I agree with the majority in finding that a contract for insurance was formed between the parties when Collins sent the letter to the Donaldsons notifying them that their application had been approved. I disagree, however, as to the determination that the condition of terminating prior policies of insurance was not waived in its entirety.

As outlined in the majority opinion, the application for insurance filed with Farm Bureau cautioned that coverage would be effective "only when the application is approved" and that a "contract will not be offered when there is other major medical or hospital surgical coverage in effect, which is not being replaced, or whenever there is a duplication of benefits

which would result in excessive coverage." The record is conclusive that the Donaldsons did not cancel their previous insurance policy. However, this finding alone is not determinative of the present action. Instead, we need to consider whether cancellation of the Donaldsons' preexisting health insurance coverage was a condition precedent to formation of a contract between the Donaldsons and Farm Bureau.

As stated by the majority, a condition precedent is a fact which must come into existence or an event which must take place before a right to performance arises. In this action, Farm Bureau evidently established as a condition precedent to formation of a contract of insurance the requirement that any applicant first terminate existing insurance coverage before an application would be approved. However, any such condition was waived when Collins sent the letter to the Donaldsons stating that "the above application has been approved."

The majority agrees that this condition precedent was waived by acceptance of the Donaldsons' application for insurance. However, the majority concludes that Farm Bureau merely waived March 15, 1984, as the precise date the preexisting insurance had to be canceled, not the condition in its entirety, and that therefore a reasonable time for performance was to be implied. I disagree with this interpretation.

The issuance by the insurer of a policy with knowledge that the "other insurance" clause is violated by the existence of a prior policy constitutes a waiver of such a breach. 9 G. Couch, Cyclopedia of Insurance Law § 37B:43 (rev. ed. 1985). Here, Collins' letter stated that the Donaldsons' application for insurance was approved, and advised that the "effective date of this new policy is March 15, 1984. You may wish to make arrangements of previous policies around this date." While language in the application required the prior policies to be terminated before a policy would be offered, this subsequent letter to the Donaldsons clearly waived this requirement. Collins knew that the Donaldsons still had existing insurance. He even refers to this fact in the February letter he sent to the Donaldsons. The language "You may wish to make arrangements of previous policies around this date" can be

reasonably construed to intimate that an insured is free to cancel or not cancel existing insurance, thereby negating the mandatory cancellation language contained in the application. If the agent who takes the application is informed of another policy, the insurer, by thereafter accepting the application and issuing the policy, is estopped from setting up a condition prohibiting other insurance, since the knowledge of the agent is the knowledge of his principal. 4 G. Couch, Cyclopedia of Insurance Law § 26A:108 (rev. ed. 1984).

I would affirm the judgment of the district court.

SHAROLYN Y. LAGER, APPELLANT, V. ROBERT D. LAGER, APPELLEE.

440 N.W.2d 193

Filed May 19, 1989. No. 87-393.

Alimony: Appeal and Error. The awarding of alimony in marriage dissolution cases is a matter entrusted to the discretion of the trial judge. On appeal, an alimony award will be reviewed de novo on the record and affirmed in the absence of any abuse of discretion on the part of the trial judge.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Gary B. Randall and Elizabeth Stuht Borchers, of Marks & Clare, for appellant.

Eugene L. Hillman, of McCormack, Cooney, Mooney & Hillman, for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

PER CURIAM.

The petitioner, Sharolyn Y. Lager, appeals the award of alimony granted by the district court for Douglas County in a dissolution of marriage decree entered on March 9, 1987. The trial court ordered the respondent, Robert D. Lager, to pay alimony in the amount of $400 per month for 36 months and $100 a month for the following 36 months. The amount of

alimony as determined by the trial court is the only question raised on this appeal.

The awarding of alimony in marriage dissolution cases is a matter entrusted to the discretion of the trial judge. On appeal, an alimony award will be reviewed de novo on the record and affirmed in the absence of any abuse of discretion on the part of the trial judge. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985). While an appropriate award must be based on the circumstances of each case in light of the factors found in Neb. Rev. Stat. § 42-365 (Reissue 1988), the ultimate test is one of reasonableness. *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987); *Busekist, supra*; *Taylor, supra*.

Pursuant to the decree, Sharolyn will receive a total of $18,000 in alimony over a period of 6 years. She also has most of the equity in the family home. She will complete her teaching degree within 3 years, enhancing her employability. Under the decree, Robert already pays 50.7 percent of his net income in alimony and child support. His monthly expenses exceed his remaining income by $192. It does not appear that Robert could now afford to make larger alimony payments.

As we stated in *Watkins v. Watkins*, 209 Neb. 14, 16-17, 305 N.W.2d 894, 895 (1981):

> In determining whether alimony should be awarded, the ultimate test is one of reasonableness. *Baird v. Baird*, 196 Neb. 124, 241 N.W.2d 543 (1976). The total obligation imposed upon the party and that party's ability to make the payments required must be considered in determining whether the award made was erroneous.

Upon our de novo review of the record, we find that the award of alimony was adequate and reasonable under all the facts and circumstances. There was no abuse of discretion on the part of the trial court. Therefore, the decree of the district court should be affirmed.

AFFIRMED.

MONTEAL A. KRACMAN, APPELLEE, V. MICHAEL J. KRACMAN, APPELLANT.
440 N.W.2d 194

Filed May 19, 1989. No. 87-612.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Terrance A. Poppe, of Hecht, Sweet, Alesio, Morrow, Poppe & Otte, P.C., for appellant.

William L. Gilmore for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

PER CURIAM.

The respondent appeals the judgment of the district court for Lancaster County, Nebraska, refusing to enforce in full the terms of a joint application for modification of custodial rights and support obligations. He assigns as error the failure of the trial court to enforce that portion of the joint application whereby the custodial parent purports to relinquish claims for accrued child support.

This court has previously held that questions of custody and support are not controllable by agreement of the parties. *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). It has also held that courts are without authority to reduce the amount of accrued child support. *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978).

As required, we have carefully reviewed the record de novo to determine whether or not the trial court committed error in reaching its decision. Our review disclosed no reversible error.

Accordingly, the judgment is affirmed.

AFFIRMED.

OMAHA DOOR COMPANY, A CORPORATION, APPELLEE, V. MEXICAN FOOD MANUFACTURERS OF OMAHA, INC., APPELLANT.

439 N.W.2d 776

Filed May 19, 1989. No. 87-668.

1. **Contracts: Reformation: Equity: Appeal and Error.** An action to reform a written contract is equitable in nature and is tried de novo on appeal to the Supreme Court. This review is subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Contracts: Reformation: Intent.** Reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent their true intent.
3. **Contracts: Reformation.** In the event of a mutual mistake, the erroneous written agreement is conformed to the antecedent agreement of the parties; that is to say, to the agreement entered into prior to the execution of the erroneous written agreement.
4. **Contracts: Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
5. **Contracts: Reformation: Intent: Words and Phrases.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
6. **Reformation: Evidence.** To obtain reformation, the evidence must be clear, convincing, and satisfactory.
7. **Contracts: Reformation.** The fact that one of the parties denies that a mistake was made does not prevent a finding of mutual mistake, nor prevent reformation.
8. **Leases: Time.** Rent is not payable until it falls due under the terms of a lease, and no suit can be brought for future rent in the absence of a clause permitting acceleration.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed in part, and in part remanded.

James R. Place and Alan M. Thelen, of Breeling, Welling & Place, for appellant.

James Martin Davis for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

WHITE, J.

This is an appeal from a judgment of the district court for Douglas County granting reformation of a lease agreement executed by the parties on May 26, 1982. The property was leased to the appellant, Mexican Food Manufacturers of Omaha, Inc. (Mexican Food), by the appellee, Omaha Door Company (Omaha Door). The appellant contends that the district court erred both in granting reformation of the written lease agreement and in awarding damages of $14,852.92 to Omaha Door, because insufficient evidence exists to support the money judgment.

The parties began negotiating the rental of property owned by Omaha Door located at 36th and T Streets in Omaha in November of 1981. These negotiations continued, off and on, through May of 1982. Present at these negotiations were the presidents of the two corporations, Leo Murnan of Omaha Door and Ricardo Correa of Mexican Food. Also present during the early stages of these negotiations was Don Byrne, Omaha Door's head bookkeeper. The parties agreed on a base rent of $1 per square foot.

When Correa first examined the premises, he noted that the property would require remodeling and improvements before it would be suitable for occupation by Mexican Food. Initially, Correa estimated that it would cost from $30,000 to $35,000 to remodel the building to suit the use anticipated by him. Correa wanted Omaha Door to use its own funds on behalf of Mexican Food, as he did not feel that Mexican Food should be obligated to pay for all of the remodeling expenses. Omaha Door originally refused to acquire a loan for Mexican Food. However, as a result of subsequent negotiations, Omaha Door agreed to borrow $15,000 on Correa's behalf, so long as Mexican Foods would repay the amount, with interest, over the term of the lease. Correa insisted that this amount was insufficient, and negotiations subsequently broke down. Byrne was present throughout these negotiations. Shortly thereafter, negotiations resumed between the parties, but Byrne was not

present at these subsequent negotiations. As a result of these negotiations, a rental agreement was eventually signed. It is the terms of this lease agreement regarding the amount of the loan acquired on Mexican Food's behalf that is the basis of this suit.

The terms that were included in the written lease are not disputed. The lease provides an amortization schedule requiring repayment of the loan over the 5-year period of the lease. The amount amortized, allegedly in error because of a mutual mistake, is $15,000.

The appellant contends that the agreement as written is correct. Mexican Food alleges that the appellee, Omaha Door, agreed to pay $25,000 for the remodeling, that Mexican Food would repay the appellee $15,000, and that repairs in excess of $25,000 would be paid by the appellant, an amount of $7,200. In contrast, the appellee argues that as a result of the renewed negotiations, Mexican Food agreed to come down on its demand and Omaha Door agreed to come up, eventually agreeing that $25,000 would be borrowed by Omaha Door on behalf of Mexican Food. This amount was agreed upon after an estimate was made disclosing that the total cost of the remodeling would be $32,000. Thereafter, Omaha Door agreed to borrow $25,000 for Mexican Food, subject to full repayment by Mexican Food, and Mexican Food agreed to use at least $7,000 of its own funds to accomplish the remodeling. The $25,000 was to be paid back to Omaha Door by Mexican Food in monthly principal and interest payments amortized over the 5 years of the lease.

According to the appellee, $15,000 instead of $25,000 was mistakenly amortized in the lease because of an error committed by the bookkeeper for Omaha Door, Byrne. Byrne was responsible for including the repayment schedule in the rental agreement, but was unaware that during subsequent negotiations Murnan of Omaha Door had agreed to borrow $25,000 on behalf of Mexican Food, instead of the $15,000 discussed in the original negotiation. As a result of this misunderstanding, Byrne placed the incorrect repayment schedule in the contract based on a loan of $15,000, instead of the $25,000 actually borrowed by Murnan. This error was discovered by Byrne in September, when he examined the

Mexican Food file in computing the amount of rent due for the month of October, the date Mexican Food's occupancy was to begin.

When Byrne examined the file, he noticed for the first time a letter from Correa to Murnan dated March 10, 1982. The letter states in part:

> I want to express to you that I have a clear understanding that you will only borrow on my behalf $25,000.00 to initiate leasehold improvements on your building at 5501 South 36th Street.
>
> I understand that even though you are borrowing the $25,000 on my behalf, I will have sole responsibilities [sic] for repayment of this loan. It comes down to the fact that I will be investing over $35,000 (including interest) in your building, but that you will be securing the loan for me.

After discovering this communication, Byrne realized that he had mistakenly included a repayment schedule only for the $15,000 originally discussed by the parties. He contacted Murnan immediately regarding the mistake, and Murnan notified his attorney of the error.

The district court granted reformation of the agreement, finding that a mutual mistake existed regarding the amount of the loan amortized in the lease agreement. It is with this remedy that the appellant claims error.

An action to reform a written contract is equitable in nature and is tried de novo on appeal to the Supreme Court. *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985); *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976). This review is subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Ridenour, supra*; *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983).

Reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent their true intent. *Ridenour, supra*. In this jurisdiction reformation may be decreed where there has been a mutual mistake. In such an event, the erroneous written agreement is conformed to the antecedent agreement of the parties; that is to

say, to the agreement entered into prior to the execution of the erroneous written agreement. *Ridenour, supra*; *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984).

In the present action the appellee alleges that Byrne entered the wrong figures in the lease agreement by mistake and that the parties had previously agreed that Correa of Mexican Food would be responsible for full repayment of the $25,000 loan undertaken by Omaha Door on its behalf. In contrast, the appellant contends that if such a "mistake" exists, the mistake was only unilateral, as Mexican Food never intended to be responsible for more than $15,000.

A mutual mistake is a belief shared by the parties which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986). As stated by this court in *Newton*,

> "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties." [Citation omitted.]
>
> If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.

Id. at 613, 386 N.W.2d at 430. To obtain reformation the evidence must be clear, convincing, and satisfactory. *Ridenour, supra*.

The evidence that the repayment schedule for $15,000 instead of $25,000 was entered in the lease agreement by the mistake of Byrne and that, in fact, both parties had previously agreed that Mexican Food would repay Omaha Door $25,000 is clear and convincing, entitling Omaha Door to reformation of the agreement. That this was the actual agreement of the parties is most clearly evidenced by the letter Correa wrote to Murnan on March 10, 1982, stating his "understanding" that the *$25,000* was being borrowed on his behalf and his

"understanding" that he had the sole responsibility for repayment of the loan. Merely because at trial Correa contended that this letter did not really mean *his* understanding at all does not prevent a finding of mutual mistake. The fact that one of the parties denies that a mistake was made does not prevent a finding of mutual mistake, nor prevent reformation. *Newton, supra*, citing *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

As stated above, although this action is triable de novo to this court, this review is subject to the rule that the trial court had the opportunity to observe the witnesses and accepted one version of the facts over another. *Ridenour, supra.* The trial court evidently found the testimony of Correa to be less credible than that of Murnan, especially in view of his March 10 letter. As a mutual mistake existed regarding the amount of the loan to be repaid by Mexican Food, the trial court properly reformed the lease agreement.

The appellant's second assignment of error, as to the proper amount of the monetary award order by the district court, is another matter. The amortization schedule as written and as reformed provides as follows:

	$15,000 (as written)	$25,000 (as reformed)
First year (interest only, per month)	187.50	312.50
Second through fifth years (principal and interest, per month)	417.46	695.75

On the basis of this table, the difference amounts to $14,857.92. The amount ordered paid by the district court was $14,852.92. However, as of the trial date of June 22, 1987, the entire lease term had not yet ended. Rent is not payable until it falls due under the terms of a lease, and no suit can be brought for future rent in the absence of a clause permitting acceleration. *First Nat. Bank v. Omaha Nat. Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974). Because of this rule, the appellant cannot be held liable for rent that had not yet accrued on June 22, 1987.

The appellee does not contest the application of this doctrine in the present case, but instead argues that the issue is moot, as the lease has expired by this time. However, as of the date of the district court judgment, June 22, 1987, 5 months 8 days of the lease term had not yet expired, amounting to a $1,465.66 difference in rent not yet accrued. Therefore, the district court award of $14,852.92 was in error in the amount of $1,460.66, and is vacated.

Nonetheless, in this court the cause is triable de novo, and we have the authority to enter an independent judgment. As of the date of this appeal, the entire amount of rent has accrued, and we therefore grant the appellee $14,857.92 in rent past due under the reformed lease agreement.

The judgment of the district court is hereby affirmed in part, and remanded for judgment to be entered in favor of the appellee for $14,857.92.

AFFIRMED IN PART, AND IN PART REMANDED.

RICHARD L. CORMAN, APPELLEE AND CROSS-APPELLANT, V. DIANE MUSSELMAN, APPELLANT AND CROSS-APPELLEE.

439 N.W.2d 781

Filed May 19, 1989. No. 87-744.

1. **Contracts: Actions.** A suit for breach of contract presents an action at law.
2. **Appeal and Error.** The factual findings of a trial court in a law action tried without a jury have the effect of findings of a jury and will not be set aside unless they are clearly wrong.
3. **Judgments: Appeal and Error.** In reviewing the trial court's judgment in an action at law tried to the court, the Nebraska Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party and resolves conflicts in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
4. **Principal and Agent: Words and Phrases.** Apparent or ostensible authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons.
5. **Principal and Agent: Estoppel.** A party who has knowingly permitted others to

treat one as her or his agent is estopped to deny the agency.

6. **Principal and Agent: Words and Phrases.** Apparent authority is such authority as the agent seems to have by reason of the authority she or he actually has. A principal is bound by, and liable for, the acts which an agent does within her or his actual or apparent authority.
7. **Principal and Agent.** Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority; yet, the apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent.
8. **Prejudgment Interest: Claims.** Prejudgment interest may not be recovered on an unliquidated claim.
9. _____: _____. A claim is unliquidated where a reasonable controversy exists as to either the right to recover or the amount of recovery.
10. **Damages: Evidence.** The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.
11. **Trial: Evidence: Appeal and Error.** The matter of permitting a party in a civil case to withdraw her or his rest is within the trial court's discretion; thus, the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded with direction.

Donald W. Pederson and Terrance O. Waite, of Murphy, Pederson, Piccolo & Pederson, for appellant.

Nancy S. Freburg, of Freburg & Hoffmeister, and Stephen R. Illingworth, of Tringe & Illingworth, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

CAPORALE, J.

Following a bench trial in this action for breach of an employment contract, the district court entered judgment in favor of plaintiff-appellee, Richard L. Corman, in the sum of $9,921.99 plus prejudgment interest. Defendant-appellant, Diane Musselman, challenges the judgment by asserting, in summary, that the district court erred in (1) finding the evidence sufficient to support Corman's allegations and (2) awarding prejudgment interest. Corman has cross-appealed, asserting that the district court erred in (1) permitting defendant Musselman to reopen her case after she had rested and (2)

receiving irrelevant evidence, including an exhibit not disclosed at the pretrial conference. We affirm in part, and in part reverse and remand with direction. We also award Corman a statutory attorney fee.

Corman first met defendant Musselman's husband, Rex Musselman, in mid-December of 1984, when both men were undergoing inpatient alcohol treatment at the Veterans' Administration hospital in Grand Island, Nebraska. At this time, Rex Musselman was also suffering with emphysema, spending much of his time in a wheelchair and making use of bottled oxygen. Through Rex Musselman, Corman became interested in the hearing aid business. Corman successfully completed his alcohol treatment program in January of 1985 and, upon release, spent several days each week for the last 2 weeks of January researching what he thought to be Rex Musselman's business.

Rex Musselman was subsequently released from the hospital, whereupon he and Corman, on February 1, 1985, entered into an arrangement whereunder Corman would work for Kearney Hearing Aid Center. Under the terms of this arrangement, Corman was to be employed by the center as a hearing aid sales trainee at $7.50 per hour, with half of that amount to be funded through the Veterans' Job Training Act of 1983, 29 U.S.C. § 1721 (Supp. I 1983). Federal agency documents executed in connection with this arrangement list Rex Musselman as the owner of the center.

On March 6, 1985, Corman entered into the written contract of employment upon which this action is based. The document, prepared by Rex Musselman and executed by him for the center, provides in relevant part that the center would employ Corman

> to serve and perform such duties for [the center] at such time and place and in such manner as the [center] may from time to time direct.
>
> [Corman] agrees to faithfully perform the duties assigned to the best of [his] ability, to devote his full and undivided time to the transaction of the [center's] business, to make to [the center] prompt, complete and accurate reports of his work and expenses, to promptly remit to [the center] all monies of the [center] collected by

> him or coming into his possession, and not to engage in or be engaged in any other interest or business during the existence of this agreement.
>
> In consideration of such service, the [center] agrees to pay [Corman] compensation as follows: THIRTY-FIVE PERCENT (35%) OF SALES.

According to Corman, "35% of sales" refers to "[s]ales of hearing aid and accessories that [he] sold," "accessories" meaning "batteries, cords, receivers, things like that." When this contract was executed, it was Corman's understanding that Rex Musselman was manager of the business and that he had authority to execute the contract.

On the same day, Corman and Rex Musselman also executed a second contract substantially identical to that quoted above but which provided that Corman was employed by Mecon Labs of Kearney, Nebraska, a manufacturer and wholesaler of hearing aids, at the rate of $7.50 per hour. The veterans' job training benefits were then transferred so as to apply to this contract rather than to Corman's employment with the center.

On March 7, 1985, the day following execution of these employment contracts, Rex Musselman explained to Corman "how the company was set up." According to Corman, Rex Musselman told him that "Diane owned the business, but he said he managed them, and he said he ran the show." At other times, Rex Musselman said, according to Corman, that "there [were] two subsidiaries, Mecon Labs and Kearney Hearing Aid Center which were formed in an outfit called Mecon, Inc., Musselmans Electronics Corporation of Nebraska." During Corman's tenure with the center, any questions he had regarding day-to-day operations or purchase of inventory were directed to Rex Musselman.

While employed at the center, Corman generally worked from 7 a.m. until 9 p.m. Monday through Friday, and for 6 to 7 hours on Saturdays. In addition to his duties for the center, Corman's workday embraced his duties for Mecon Labs. This was possible, in Corman's words,

> [b]ecause the sales at the [center] was people coming in the door. We didn't travel. I didn't go out generally to the public. I would have no means of transportation, but

when I wasn't busy and they were testing, I was on the phone making contacts with other dispensers around the United States trying to sell the Mecon hearing product.

Corman testified that during the second week of March 1985, he participated in a discussion of the terms of his employment under the March 6 contracts with both defendant Musselman and her husband. During this conversation, which took place in the office at the center, defendant Musselman retrieved copies of the March 6 contracts from the center's files and examined them while discussing their terms with Corman. In this conversation, Rex Musselman and Corman referred to Corman's employment with Mecon Labs as a second job in addition to his employment with the center under the terms of the contract.

By allowing his commissions from the center to accumulate, Corman hoped eventually to accumulate enough money to make a downpayment on the purchase of the business from the Musselmans. According to Corman, defendant Musselman made no objections to this arrangement at that time. During the following months, Corman had periodic conversations with both Musselmans regarding his accumulating commissions, and he kept track of the sum on a monthly basis. Rex Musselman's health deteriorated, and after April, Corman was the only person at the center selling and fitting hearing aid equipment.

Corman introduced sales documents indicating that while employed at the center under the subject contract, he personally completed sales of $53,428.69 worth of hearing aids with accessories. He stated he had received no commissions on these sales despite having made demand for payment. Defendant Musselman corroborated these assertions, declining to dispute the amount and admitting that she had not paid Corman any commissions.

Accurate records of the center's over-the-counter sales of supplies, such as batteries, were not maintained. Records of the center's purchases of such inventory indicate that batteries representing either a profit margin or a total net price to the retail customers of $7,300 passed through the center during Corman's tenure there. However, an unknown portion of these

batteries was destined for the Musselmans' North Platte retail store, leaving it to Corman's "educated guess" to determine the basis of his commissions for sales of batteries through the center. Corman maintains he did not receive his commission on these sales despite his demand for such payment.

Around November 25, 1985, Corman learned in a phone conversation with Rex Musselman that the center had been sold. Corman's subsequent demand for payment of commissions owed was rejected and this action instituted.

For her part, defendant Musselman testified that Rex Musselman, who died February 14, 1986, had been part owner of "Musselmans . . . a corporation in North Platte, Nebraska," and owner of a half interest in Mecon Labs in Kearney, a business in which defendant Musselman also had a half ownership interest.

Defendant Musselman maintained that she owned the center as her separate property, having acquired it by purchase in 1981 from Rex Musselman's cousin and having financed the purchase with her own separate funds. The evidence establishes that Mecon Labs and the center did not operate entirely independently. Defendant Musselman testified that "[a]ll the office paperwork was done at [the center] for Mecon Labs" and that "[t]he office secretary wrote the checks and either I signed them or there was a stamp that had Rex's name on it," both of the Musselmans being authorized to sign checks on behalf of the center.

Although defendant Musselman admitted her participation in the initial decision to hire Corman and the execution of the documents necessary to secure job training benefits, she denied any knowledge of the subsequent contract granting Corman a 35-percent commission on center sales. According to her, she became aware of Corman's written contract with the center only when presented with a copy by her attorney in connection with this lawsuit. She further denied that Rex Musselman had any authority to enter into such a contract with Corman, asserting that her husband had been but a salesman with the center, nothing more. Defendant Musselman also asserted that during the time Corman was associated with the center, Rex Musselman's judgment was periodically impaired as a result of

his illness. Yet, defendant Musselman admitted that Rex Musselman was at the center on a daily basis, that she visited only occasionally, that her husband "handled the day-to-day operations of [the center]," and that "[i]t would maybe appear to people" that Rex Musselman was running the business.

Notwithstanding defendant Musselman's testimony that she had been aware for some time before that Corman was performing work for Mecon Labs, she swore that she first became aware of Corman's written Mecon Labs contract on November 1, 1985, and canceled it the very same day. This document bears a written notation reading "Cancelled 11-1-85 Diane Musselman." In contrast, a contract executed by Rex Musselman for the sale to Corman of an automobile solely owned by defendant Musselman and which she states she also became aware of for the first time on November 1, 1985, bears a written notation reading "Cancelled Nov. 1, 1985 Richard L. Corman." The two notations do not appear to have been penned by the same hand.

Defendant Musselman rested her defense at the conclusion of her testimony. Corman then called as a rebuttal witness the secretary who worked for both Mecon Labs and the center during the time of his employment. She generally corroborated Corman's version of the manner in which the written employment contracts came into existence and testified that until the center's business began to deteriorate in 1985, she had considered Rex Musselman to be its owner. She then learned that defendant Musselman owned the center, but Rex Musselman nonetheless continued to be the person she consulted on day-to-day matters. This witness also testified that defendant Musselman first reviewed Corman's written employment contracts with the center and Mecon Labs within a month of their execution and looked at them on several occasions thereafter. According to the secretary, Rex Musselman received no regular paychecks from the center. Instead, he would take the office's cash receipts home on a weekly basis. All other center employees received paychecks.

Without withdrawing her rest and without objection, defendant Musselman then testified:

> Rex worked for me in exchange for using [center] facilities

> for his Mecon operation and I paid all of [the secretary's] salary but part of that was supposed to be her work for Mecon. That was his compensation for being a salesman for me. Also he was given cash for expenses.

Defendant Musselman later formally moved to withdraw her rest so as to present evidence regarding amounts paid to Corman during his employment. She was then permitted to testify, over objection, that Corman was paid a gross amount of $9,150 while employed by the Musselmans, including benefits received through the veterans' training program.

Defendant Musselman's first summarized assignment of error challenges the sufficiency of the evidence to support the district court's judgment in general, and particularly regarding Rex Musselman's status as her agent in executing the contract between Corman and the center.

A suit for breach of contract presents an action at law. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989); *Reeves v. Hill Aero*, 231 Neb. 345, 436 N.W.2d 494 (1989). The factual findings of a trial court in a law action tried without a jury have the effect of findings of a jury and will not be set aside unless they are clearly wrong. *Stiles v. Skylark Meats, Inc., supra*; *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). In reviewing the trial court's judgment in an action at law tried to the court, we do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the successful party and resolve conflicts in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Stiles v. Skylark Meats, Inc., supra*; *Knutson v. Snyder Industries, Inc.*, 231 Neb. 374, 436 N.W.2d 496 (1989); *Reeves v. Hill Aero, supra*.

The district court did not specifically find that an agency relationship existed between the Musselmans but, rather, found that "[Corman] entered into an agreement with [the center] that [he] would be paid 35% of all sales and such contract was binding upon [defendant Musselman] as owner of the business."

While there is contrary evidence, there is nothing which makes the testimony that defendant Musselman was sole owner

of the center inherently incredible. Thus, the court's conclusion that defendant Musselman was the center's owner at the relevant times cannot be said to be clearly wrong. As the discussion which follows demonstrates, the evidence also supports a finding that an agency relationship existed between the Musselmans sufficient to authorize Rex Musselman to enter into the contract on behalf of the center.

Apparent or ostensible authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons. A party who has knowingly permitted others to treat one as her or his agent is estopped to deny the agency. *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988). Apparent authority is such authority as the agent seems to have by reason of the authority she or he actually has. A principal is bound by, and liable for, the acts which an agent does within her or his actual or apparent authority. *Department of Banking v. Davis*, 227 Neb. 172, 416 N.W.2d 566 (1987).

Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority, *Western Fertilizer v. BRG, supra*; yet, the apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent. *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989); *Western Fertilizer v. BRG, supra*.

The record clearly establishes that defendant Musselman was aware that Rex Musselman held himself out to the community as manager of the center. It strains credulity beyond the breaking point to suggest that one whose facsimile signature is used to imprint the drawer's signature on a business check is merely the sales employee of that business and nothing more. At the very least, by doing nothing to stop her husband from holding himself out as manager of the center, defendant Musselman clothed him with apparent authority to do that which managers normally do, including enter into contracts of employment with third persons. Thus, defendant Musselman's

first summarized assignment of error is without merit.

She next argues that the district court erred in awarding Corman prejudgment interest. Prejudgment interest may not be recovered on an unliquidated claim. A claim is unliquidated where a reasonable controversy exists as to either the right to recover or the amount of recovery. *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989). Although the dollar value of the hearing aid sales Corman completed pursuant to the subject contract was not disputed, Corman claimed, in addition, that he had "sold hearing aid batteries on behalf of the [center] in the total sum of $8,190.00." Not only was this latter amount disputed, but Corman was unable to prove it at trial. The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989). Corman's otherwise unsubstantiated "educated guess" is an insufficient basis upon which to determine what portion of the total batteries purchased during the term of the subject contract were actually sold through the center during that period. Inclusion of a demand for this amount in Corman's allegations of damages under his contract with the center renders the amount demanded for the breach of that contract unliquidated, and Corman was not entitled to prejudgment interest on any amount eventually awarded. Thus, defendant Musselman's second summarized assignment is meritorious.

This brings us to Corman's cross-appeal, in connection with which he first argues that the district court erred by permitting defendant Musselman to withdraw her rest and adduce evidence as to payments which had been made to him. The matter of permitting a party in a civil case to withdraw her or his rest is within the trial court's discretion; thus, the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983); *Veik v. The Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978). It cannot seriously be contended that Corman reasonably believed the payments he received during the course of his employment by the center were not an issue in the case. Under the circumstances, permitting defendant Musselman to withdraw her rest to supply what at that point

appeared to be an oversight in proof constituted no abuse of discretion. Thus, Corman's first assignment of error on cross-appeal is without merit.

Corman next urges the district court erred by receiving irrelevant evidence, including an exhibit not disclosed at the pretrial conference. The exhibit in question is a copy of a Department of the Treasury, Internal Revenue Service W-2 Wage and Tax Statement form reflecting "[w]ages, tips, other compensation" ostensibly paid to Corman by the center during 1985 in the sum of $9,150. The main thrust of Corman's argument is that neither the questioned exhibit, nor any of the evidence touching upon what he was paid, had pertinence to the resolution of the present case. In essence, he urges that notwithstanding defendant Musselman's assertions to the contrary, the amounts reflected on the exhibit and the other questioned evidence concerning payments to him clearly relate to his employment with Mecon Labs and not to his contract with the center, the only contract at issue in this litigation. Thus, while Corman casts this assignment of error in terms of errors in the admission of evidence, he is in reality attacking the district court's evaluation of the questioned evidence.

As discussed earlier, the record establishes that Rex Musselman formed two separate and distinct employment contracts with Corman on March 6, 1985, and that he at least had authority to enter into the center contract. The pertinent contract demonstrates beyond question that from the date of its execution and throughout its term, Corman was employed by the center on a commission, not an hourly, basis. Defendant Musselman herself testified that the amount of wages reflected on the W-2 form was computed on the basis of a $7.50 hourly wage. In the face of that testimony, the pertinent center contract language, and the treatment of the veterans' job training benefits, defendant Musselman's effort to characterize the $9,150 payment as having been made under the contract with the center is inherently incredible. The district court was thus clearly wrong in offsetting any portion of that payment against the commissions Corman earned under his center contract. Corman's second assignment of error on cross-appeal is meritorious.

Accordingly, we affirm the judgment in favor of Corman, but direct that the district court modify the amount thereof by increasing it to $18,700.04, being 35 percent of Corman's completed sales of hearing aids. As our analysis establishes, Corman is not entitled to prejudgment interest.

However, pursuant to the provisions of Neb. Rev. Stat. § 48-1231 (Reissue 1988), there is hereby taxed as costs to defendant Musselman the sum of $4,675.01 for attorney fees to Corman in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

DOYLE E. KASPER, PERSONAL REPRESENTATIVE OF THE ESTATE OF DANNY E. KASPER, DECEASED, APPELLANT, V. HOWARD E. CARLSON AND CLAUDE CAPPEL, APPELLEES.

440 N.W.2d 195

Filed May 19, 1989. No. 87-745.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence.
2. **Motor Vehicles: Negligence.** It is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he was traveling.
3. _____: _____. The driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop to avoid collision with any object in front of him.
4. **Motor Vehicles: Highways: Right-of-Way.** A driver of a motor vehicle about to enter a highway protected by stop signs is required to come to a complete stop as near the right-of-way as possible before driving onto the highway. After stopping, the driver must yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection.

5. **Trial: Expert Witnesses: Appeal and Error.** The admission of evidence from expert witnesses is a matter left to the discretion of the trial court, and its ruling will be upheld absent an abuse of that discretion.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded for a new trial.

Warren C. Schrempp and Lee R. Terry, of Schrempp, Gross & Salerno, and Dennis L. Arfmann, of Winner, Nichols, Douglas, Kelly & Arfmann, for appellant.

Harold W. Kay, of Kay & Kay, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from a wrongful death action filed by Doyle E. Kasper on behalf of his son, Danny E. Kasper. This action arose from an accident which occurred on May 11, 1984, near McCook, Nebraska, between a car driven by Danny Kasper and a truck driven by Howard E. Carlson. The defendants in this action are both the driver, Carlson, and Claude Cappel, the owner of the vehicle and the employer of Carlson. At trial, the jury returned a verdict against the plaintiff, Doyle Kasper. The plaintiff appeals, assigning as errors: (1) the district court's overruling the plaintiff's motion for a directed verdict, (2) the failure of the district court to instruct the jury that the defendants were negligent as a matter of law, and (3) the admission of testimony by a "reconstruction" expert witness regarding the speed of the decedent before the accident. Because we believe that the trial court erred in not instructing the jury that the defendant Carlson was negligent as a matter of law, but find that a factual question remains regarding the contributory negligence of the decedent, we remand this cause for a new trial.

On the evening of May 11, 1984, Danny Kasper went to the home of his good friend, Jeffrey Hall, and the two of them went to "cruise" Main Street in McCook, as did most other local high school students. At approximately 10:30 p.m., Kasper and Hall proceeded south out of McCook on West River Road. River

Road is a two-lane highway that runs north-south. There are various roads intersecting the highway from the east and west. The intersections are protected by stop signs. The accident occurred at a "T" intersection, where a gravel east-west county road intersects River Road. Entry onto the paved River Road from the east-west gravel road is controlled by a stop sign located 55 feet west of River Road.

On the date of the accident, Carlson was proceeding east on the gravel county road in a truck owned by his employer, Cappel. Carlson testified that he knew a stop sign existed, and he stopped, looking both to his left (north) and right (south). At this time the decedent was driving south on River Road, approaching the intersection from the north. After stopping back at the stop sign, Carlson proceeded to the pavement of River Road. He testified that following his stop at the stop sign, 55 feet back from the intersection, he never again looked to his left, but turned to the left across the southbound lane of River Road, while looking to his right. Carlson testified that he first looked back to the left again after the front of his truck was about halfway through the intersection. The defendant testified that he never saw the headlights of the decedent's car until he looked to the left when he was already in the intersection.

Hall, the passenger in the Kasper vehicle, survived the crash. He testified at trial regarding what he could remember of the collision. Hall could not recall where he was looking at the time the Kasper vehicle neared the intersection. In fact, he did not see the pickup until seconds before the collision. He did not see Carlson enter River Road.

The force of the impact crushed the front of Kasper's Camaro, primarily on the left side. The Camaro slammed into the left side of the truck and was "submarined" under it, causing the truck to flip upside down. Kasper was killed in the accident, and both Hall and Carlson were injured.

In the appellant's first assignment of error, he contends that the district court committed error by not directing a verdict for the plaintiff. We believe this contention is in error. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Sundeen v. Lehenbauer*, 229

Neb. 727, 428 N.W.2d 629 (1988). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law. *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988). Although we find, as discussed below, that the trial court erred in not instructing the jury that the defendant was negligent as a matter of law, there was a substantial amount of evidence regarding the speed of the Kasper vehicle at the time of the accident. Evidence that the decedent may well have exceeded the speed limit at the time of the collision constitutes an issue of fact regarding the contributory negligence of the decedent and is a proper issue for the jury. Therefore, this first assignment of error is without merit.

Regarding the appellant's second assignment of error, we agree that the trial court erred in not instructing the jury that the defendant was negligent as a matter of law. This case involves a right-of-way violation by the defendant Carlson, and there are a number of Nebraska cases applicable to this situation. It is well established in this jurisdiction that a motorist is required to yield the right-of-way to a vehicle traveling on a highway protected by stop signs if the vehicle is close enough to the intersection to pose an immediate hazard. *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986). The appellees agree with this proposition in general, but state that in this case, because the issue of the excessive speed of the decedent's vehicle was controverted, the issue of the negligence of the defendant was properly submitted to the jury and a verdict could not have been directed. We disagree.

In *Chlopek*, we also addressed the issue of the excessive speed of the plaintiff, a case involving facts very similar to the ones at issue in this case. In *Chlopek*, we stated:

> In arguing that it was excessive, the defendants would invoke the "range of vision" rule. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed

> or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he was traveling. . . . " ' "The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object *in front of him*." ' " (Emphasis supplied.)
>
> The foregoing rule is not applicable here. Plaintiffs' driver was not approaching any vehicle or object in front of him, but was approaching an intersection on the favored highway protected by stop signs, where Kelly Schmall was stopped before pulling out in front of him.

Id. at 83-84, 396 N.W.2d at 107. Similarly, in this case, Kasper was not approaching any vehicle in front of him but, instead, was nearing the intersection, when Carlson suddenly pulled out in front of him.

In *Chlopek*, we also reiterated the rules applicable to cases involving violation of the right-of-way of the driver on the favored highway. A driver of a motor vehicle about to enter a highway protected by stop signs is required to come to a complete stop as near the right-of-way line as possible before driving onto the highway. After stopping, the driver must yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection. The driver has a duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others. A person traveling on the favored street protected by stop signs of which he has knowledge may properly assume that motorists about to enter from a nonfavored street will observe the foregoing rules. *Chlopek, supra*, citing *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978).

In the present case, the defendant Carlson was traveling on a gravel road that intersected with River Road into a "T" intersection. Entry onto River Road from the intersection was protected by a stop sign. In his own testimony, Carlson stated

that he stopped at the stop sign and looked both directions. At that time he was 55 feet from the pavement of River Road. After stopping at the stop sign, the defendant then drove to the pavement. Carlson stated that after starting from the stop sign 55 feet west of the favored highway, he never looked to the north (his left) again before driving onto the highway. In fact, Carlson testified that he was "about half way through the intersection" before he looked back to his left again after leaving the stop sign.

In addition, there is testimony from more than one witness that Carlson made a damaging admission following the accident. Brian Beyer happened upon the scene of the accident immediately following the impact. Beyer testified that Carlson "just kept mumbling that he couldn't stop and his foot slipped off the brake and [he] went out in the intersection." Further, Trooper Michael J. Jacoby, who arrived on the scene as the accident investigator, interviewed Carlson following the collision. At trial, Trooper Jacoby testified that when Carlson was asked if he could explain what happened at the accident, he said, "I saw the car coming. Tried to dim my lights. Slowed down. Put the brake—put the clutch and brake on. My foot slipped off the brake. I tried to put the brakes back on and my foot got stuck [and] I went through the intersection." At trial, the defendant did not dispute these admissions. Instead, when questioned by plaintiff's counsel regarding these statements, Carlson merely stated that he did not remember whether he had made them. He never contended that he did not make the statements.

Because the evidence as discussed above was established at trial, the plaintiff is entitled to an instruction that the defendant Carlson was negligent as a matter of law. The contributory negligence of the decedent is another matter.

Because of the considerable evidence regarding the speed of the Kasper vehicle at the time of the accident, an issue of fact remains regarding the contributory negligence of the decedent. Therefore, this cause must be remanded for a new trial.

In his final assignment of error, the appellant contends the district court erred in admitting the testimony of the appellees' reconstruction experts, as there was no adequate factual basis

for admission of testimony by those experts. The admission of evidence from expert witnesses is a matter left to the discretion of the trial court, and its ruling will be upheld absent an abuse of that discretion. *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987); *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982). As the evidence on retrial may well be different from that presented at the first trial, no benefit would result from consideration of this alleged error.

Accordingly, the judgment is reversed and the cause remanded to the district court for a new trial in accordance with the foregoing opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

The majority opinion determines that the judgment should be reversed because the trial court failed to give a requested instruction that the defendant Carlson was negligent as a matter of law. That finding appears to be based upon the defendant's failure to see the Kasper automobile approaching from the north and the statement that the patrolman and Beyer testified the defendant made following the accident.

As we stated today in *Jones v. Goeden, post* p. 177, 180, 440 N.W.2d 199, 202 (1989), "Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position. *Getzschman v. Yard Co.*, 229 Neb. 231, 426 N.W.2d 499 (1988)." As I understand the record in this case, there is no evidence which undisputably locates the Kasper vehicle in a favored position.

The failure of a motorist to maintain a continuous lookout is not such evidence of negligence as would bar a recovery unless it be conclusively shown that the other vehicle was in the area of danger. *Pupkes v. Wilson*, 172 Neb. 15, 108 N.W.2d 220 (1961). The driver of a vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Before a verdict can be properly directed in such a case, the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise, the question becomes one for the jury. *Pupkes v.*

Wilson, supra. See, *Hellmeier v. Policky*, 178 Neb. 170, 132 N.W.2d 760 (1965); *Jershin v. Becker*, 217 Neb. 645, 351 N.W.2d 48 (1984); *Treffer v. Seevers*, 195 Neb. 114, 237 N.W.2d 114 (1975).

The case is further complicated by the fact that although the appellant has assigned as error the failure to give the requested instruction, the transcript does not contain the instructions of the court on which the case was submitted to the jury. See *Malcom v. Hansen*, 32 Neb. 50, 48 N.W. 883 (1891).

So far as the defendant's statement to the patrolman and Beyer is concerned, the defendant's testimony as to how the accident happened, together with his deposition statement, offered by the appellant, that defendant's foot did not "get stuck between the clutch and brake," was a sufficient denial to make it a question for the jury as to how the accident happened.

CAPORALE, J., joins in this dissent.

DAPHANE Y. JONES, APPELLANT, V. ERVIN H. GOEDEN, APPELLEE.

440 N.W.2d 199

Filed May 19, 1989. No. 87-872.

1. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, this court must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.
2. **Directed Verdict.** A directed verdict is proper only where an issue should be decided as a matter of law.
3. **Motor Vehicles: Negligence: Evidence.** A violation of a statute or ordinance regulating speed does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether the violation is negligence.
4. **Motor Vehicles: Negligence.** Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
5. **Directed Verdict: Motor Vehicles: Trial.** Before a verdict can be properly directed against one who has looked and failed to see, the oncoming motor vehicle must be definitely located in a favored position. Otherwise, the question becomes one for the jury.

6. **Motor Vehicles: Right-of-Way.** The driver of a vehicle who intends to turn to the left within an intersection shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so closely as to constitute an immediate hazard. Neb. Rev. Stat. § 39-636 (Reissue 1988).
7. **Motor Vehicles: Negligence: Trial.** Where a motorist looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for a new trial.

William L. Switzer, Jr., of Rickerson, Welch & Kruger, for appellant.

James W. Knowles, Jr., of Knowles Law Office, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

FAHRNBRUCH, J.

Daphane Y. Jones appeals the trial court's dismissal of her property damage claim arising from a two-car collision at 52d and Leavenworth Streets in Omaha, Nebraska. A directed verdict against Mrs. Jones was entered upon the close of her evidence. We reverse and remand the property damage claim for a new trial.

In addition to the property damages, Mrs. Jones sued for personal injuries. A jury verdict awarded Mrs. Jones personal injury damages. That cause of action was not appealed.

On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, this court must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Henderson v. Forman*, 231 Neb. 440, 436 N.W.2d 526 (1989); *Russell v. Norton*, 229 Neb. 379, 427 N.W.2d 762 (1988). A directed verdict is proper only where an issue should be decided as a matter of law. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

At the time of the accident, Mrs. Jones was a passenger in a car traveling west in the curb lane on Leavenworth Street. The

car was being driven by appellant's husband, Warren G. Jones. The accident occurred when the appellee, Ervin H. Goeden, who was traveling east on Leavenworth Street, made a left-hand turn north onto 52d Street in front of the Joneses' westbound vehicle.

Goeden testified that he saw westbound traffic approximately 200 feet away approaching the intersection, but thought he could safely complete his turn. He said he did not see the Jones vehicle specifically until just before the impact. Goeden testified that he "assumes" the Jones car was among the approaching traffic. Mr. Jones testified that he did not see Goeden's car until it was too late to stop. Goeden, who testified he was traveling from 5 to 10 m.p.h., made his left-hand turn across two lanes of traffic without ever stopping. A traffic light at the intersection was green for eastbound and westbound traffic.

Mr. Jones testified he had been driving the speed limit, 35 m.p.h. Mrs. Jones testified that her car was traveling no more than 39 m.p.h. Both the defendant and Mr. Jones stated that immediately following the collision, Mrs. Jones berated her husband for driving "crazy."

Before trial, Mr. Jones assigned his property damage claim to his wife. At the close of plaintiff's evidence, the district court sustained defendant's motion for a directed verdict as to the property damage claim. The court reasoned that Mr. Jones "was [contributorily] negligent and, if not contributorily negligent, at least she [Mrs. Jones] should be barred from recovery . . . ."

Mrs. Jones assigns one error: that the trial court erred in sustaining the defendant's motion for a directed verdict in regard to her property damage claim.

The trial court did not specify how Mr. Jones was contributorily negligent. Goeden raises two arguments in his brief: (1) that Mr. Jones was contributorily negligent as a matter of law in exceeding the speed limit, and (2) that Mr. Jones was contributorily negligent as a matter of law in failing to see the defendant's car.

Appellant's evidence regarding the speed of the Jones vehicle is in conflict. It was traveling between the speed limit, 35

m.p.h., and 39 m.p.h. Taking the view most favorable to the plaintiff, the Jones car was not exceeding the speed limit at the time of the accident. Evidence of the speed of the Jones vehicle presented in the appellee's case in chief was not before the trial court at the time the motion for directed verdict was sustained and cannot be considered on review. See *Henderson, supra.*

The evidence does not support a finding that Mr. Jones was contributorily negligent as a matter of law because he was exceeding the speed limit at the time of the accident.

In a city, speed limits are established by city ordinance and sometimes by state statutes. A violation of a statute or ordinance regulating speed does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether the violation is negligence. See, *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978); *Peake v. Omaha Cold Storage Co.*, 158 Neb. 676, 64 N.W.2d 470 (1954).

Goeden also argues that Mr. Jones was contributorily negligent as a matter of law because he failed to see Goeden's car. Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position. *Getzschman v. Yard Co.*, 229 Neb. 231, 426 N.W.2d 499 (1988). Before a verdict can be properly directed against one who has looked and failed to see, the oncoming motor vehicle must be definitely located in a favored position. Otherwise, the question becomes one for the jury. *Id.*

From Mrs. Jones' evidence, it cannot be said that Goeden was undisputably in the favored position. Nor does Goeden argue that he was in a favored position at the time of the accident.

Neb. Rev. Stat. § 39-636 (Reissue 1988) provides that "[t]he driver of a vehicle who intends to turn to the left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard."

Goeden's testimony is subject to two interpretations. He assumes that the Jones vehicle was among the traffic he saw

coming from the east toward the intersection. If that is true, Goeden misjudged the speed and distance of the approaching traffic and proceeded to turn, possibly in violation of § 39-636.

The other inference which can be drawn from Goeden's testimony is that the car driven by Mr. Jones was not among the approaching traffic but was nearer the intersection and that Goeden failed to see the Jones vehicle. In that instance, where both drivers failed to see the other car, one driver was in the favored position and the other was negligent as a matter of law.

No matter which scenario is employed, the question of who was in the favored position is one for the jury. It is for the jury to determine whether Goeden misjudged the situation or failed to see the Jones car. Where a motorist looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury. *Getzschman, supra.*

Goeden's negligence, if any, and Jones' negligence, if any, and the degree thereof when one is compared with the other are questions for the jury. The motion for directed verdict on the issue of property damages at the end of plaintiff's case was not properly granted.

The decision of the trial court granting defendant's motion for a directed verdict is reversed and the cause remanded for a new trial on the property damage claim.

REVERSED AND REMANDED FOR A NEW TRIAL.

BRUNING SEEDING COMPANY, APPELLEE AND CROSS-APPELLANT, V. McARDLE GRADING COMPANY, APPELLANT AND CROSS-APPELLEE.

439 N.W.2d 789

Filed May 19, 1989. No. 87-972.

1. **Appeal and Error.** In an action at law, where a jury has been waived and evidence is in conflict, the Supreme Court, in reviewing the judgment, will presume that controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly

wrong; it is not within the province of the Supreme Court to resolve conflicts or reweigh evidence.

2. **Contracts: Breach of Contract.** A party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform same, cannot recover for a breach thereof by the other party.
3. **Breach of Contract: Damages.** When a breach of contract occurs, the plaintiff is entitled to the full profit he would have realized under the contract.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed as modified.

Malcolm D. Young and Jeff C. Miller, of Young & White, for appellant.

Thomas R. Wolff for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

WHITE, J.

This is an appeal and cross-appeal from the district court for Douglas County following a verdict for the plaintiff in a contract action. In a trial to the bench, the court returned a verdict for the plaintiff in the amount of $19,580.

There are many contested facts in this case; however, in an action at law, where a jury has been waived and evidence is in conflict, the Supreme Court, in reviewing the judgment, will presume that controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong. It is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence. *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985). The following facts most favorable to the plaintiff-appellee, Bruning Seeding Company (Bruning), can be deduced from the evidence.

In May of 1983, the defendant-appellant, McArdle Grading Company (McArdle), was awarded the general contract for a Missouri River project by the Corps of Engineers. Under the terms of the contract McArdle was to build a levee on the Nebraska side of the Missouri River near Bellevue. In addition to building and grading the levee, McArdle was to construct the drainage structures and seed and mulch the levee slopes,

borrow pits, berm areas, and wildlife habitat area. After McArdle was awarded the levee contract, Bruning was awarded and signed, on June 1, 1983, a subcontract for the seeding of the levee slopes, borrow pits, and wildlife habitat, and for the planting of trees in the wildlife habitat for the Missouri River project.

Robert Bruning and Paul McCune operate separate seeding businesses involved in different types of seeding. Robert Bruning operates a business designated Bruning Seeding Company. Robert Bruning and McCune jointly operate a company known as Commercial Seeding Contractors. The latter company performs work requiring the blowing of straw mulch over seed once the seed is placed, and has developed a unique mulch machine for that purpose. McArdle knew that the mulching operation of the Missouri River seeding project was to be performed by Commercial Seeding. Robert Bruning was a 50-percent owner of Commercial Seeding and, as Bruning did not own a mulcher, when Bruning obtained contracts, Commercial Seeding's mulcher was used on the projects where mulching was necessary.

Little work was completed on the Missouri River project in 1983. In 1984, the project was under 3 to 4 feet of water from a flood. McArdle believed that it would not be able to work the project in 1984 due to this flood and was able to secure other projects. No seeding was completed in 1984.

Representatives of Bruning and McArdle drove to the levee in the early part of May 1985. At that time the property was too wet for seeding, but McArdle said that it would be ready in approximately 10 days. A significant amount of rain fell in 1985 after the site inspection in early May.

In 1985, Commercial Seeding was involved in another project using the mulcher that would be used by Bruning on the Missouri River project. The project was the Nebraska Department of Roads' Maple Street project near Elkhorn, Nebraska. This project was to be done in segments over several years. The general contractor for the Maple Street project was Vrana Construction Company, and Commercial Seeding had a subcontract for the seeding and erosion control work. Vrana had a segment ready for seeding on May 9, 1985, and

Commercial Seeding began disking at that site on May 11. At that time, Bruning had not received notice from McArdle that any portion of the Missouri River levee was ready for seeding.

There is conflict in the record as to when McArdle next contacted Bruning. Murray McArdle has asserted various dates and times, insisting that each was when he told Bruning to commence seeding on one-half of the Missouri River project. Robert Bruning testified that McArdle spoke with him around the 23d of May and told him that one-half of the project would be ready to be seeded in a few days. Robert Bruning also testified that he was first asked to the job after Memorial Day, around the 29th or the 30th of May. In a phone conversation on June 3 or 4, Robert Bruning told McArdle that he could be on the job around June 10, as he had made arrangements for another crew from the Gerald Roach firm in Lincoln, Nebraska, to help complete the Maple Street project so that he could go to the Missouri River levee project. At that time, McArdle told Robert Bruning that he had already secured another firm to do the seeding. Behrens Construction Company came on the job on June 11. Bruning was never allowed to do any of the seeding on the levee project. The wildlife habitat was seeded by Lanoha Nursery after McArdle went to the nursery directly and contracted for it to do the seeding job. No written notice was ever given to Bruning to commence work.

Section 6 of the subcontract provided in part:

> (b) In the event the Subcontractor fails to comply or becomes disabled from complying with the provisions herein as to character or time of performance, and the failure is not corrected within five (5) days after written request by the Contractor to the Subcontractor, the Contractor, by subcontract or otherwise, may without prejudice to any other right or remedy, take over and complete the performance of this Subcontract at the expense of the Subcontractor, or without taking over the work, may furnish the necessary materials and/or employ the workmen necessary to remedy the situation at the expense of the Subcontractor.

All parties concede that no written notice was given to Bruning

to commence work at any time, either to notify the appellee what the appellant felt was Bruning's failure of performance, or to give the appellee time after a written notice was issued before another contractor was called onto the job. The district court found that the failure to give any written notice to the appellee before substituting a third party to perform seeding was a breach of the subcontract by McArdle, and awarded damages of $19,580.

The appellant contends that the district court erred in finding that McArdle breached the subcontract and in awarding damages to Bruning. The appellee cross-appeals and contends that the district court erred in not awarding Bruning the profits anticipated from the planting of the wildlife habitat, amounting to an additional $3,500 in damages.

Although the exact date that the appellee was requested to report to work is contested, the trial court found that it was communicated to Bruning on May 28, 1985, that Bruning needed to come to the site and begin seeding. As this finding is not clearly wrong, it will be upheld by this court. *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985).

However, it is uncontested that no written notice was given to Bruning that unless Bruning performed immediately, McArdle was going to hire someone else to complete the work on the Missouri River project. Section 6(b) of the subcontract in effect between the parties required that if McArdle felt that Bruning had failed to perform the contract in a timely manner, the general contractor (McArdle) must give 5 days *written* notice to the subcontractor, Bruning, to cure the defect. If Bruning had not cured the defect within the 5 days given, McArdle could take over the subcontract or, in the alternative, hire another subcontractor to perform the subcontract.

Section 6(b) of the subcontract provided the general contractor with a remedy if it felt the job was not being done according to the contract terms. Instead of complying with the notice provisions that McArdle itself demarcated in the subcontract, the appellant chose merely to hire another subcontractor to perform the work, without giving Bruning an opportunity to cure any defect. This noncompliance with the contract terms constituted a breach of the contract by McArdle,

entitling Bruning to the profits it lost because of the breach. The trial court was therefore not in error in awarding damages to Bruning.

The appellant argues that the decision of the trial court cannot be sustained, because in its decision no finding was made that the appellee was ready, willing, and able to perform the terms of the subcontract at the time McArdle hired another to perform. It is true that "a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform same, cannot recover for a breach thereof by the other party." *Bodtke v. Bratten*, 166 Neb. 36, 44, 88 N.W.2d 159, 165 (1958). However, it is implicit in the findings of the district court that the appellee was ready, willing, and able to perform on the subcontract. The district court found that on May 28, 1985, McArdle requested Bruning to commence work on the project. In addition, the court found that during the conversation of June 3 or 4 when Murray McArdle stated that he would have another perform the work, Robert Bruning told McArdle that he would have a crew with a mulcher on the project by June 10, 1985. This offer was refused by McArdle. In fact, Behrens Construction did not start work on the project until June 11, 1 day after Bruning had assured McArdle that it would be on site to perform the seeding. These findings are amply supported in the record. The contention of the appellant that the decision of the district court cannot stand because of a failure to find that the appellee was ready, willing, and able to perform is without merit.

However, the trial court was in error in calculating the damages due Bruning because of the breach. When a breach of contract occurs, the plaintiff is entitled to the full profit he would have realized under the contract. See *Wiebe Constr. Co. v. School Dist. of Millard*, 198 Neb. 730, 255 N.W.2d 413 (1977). In the factual findings made by the district court, the trial court disregarded the portion of the testimony with respect to the anticipated profit of $3,500 for the planting of the trees in the wildlife habitat. The appellee established the profit lost on the portion of the contract devoted to the wildlife plantings and is therefore entitled to this amount in damages as well. Bruning

had provided Lanoha Nursery with a list of the trees needed under the subcontract. Lanoha Nursery proposed to deliver and plant the wildlife habitat planting for $12,500. These terms were orally agreed to by Robert Bruning and Lanoha Nursery. The appellee bid the tree planting to McArdle for $16,000, thereby ensuring Bruning a profit of $3,500 on the wildlife habitat plantings. Because Bruning established these lost profits with sufficient certainty, Bruning succeeds on this cross-appeal, and the opinion of the district court must be modified to allow Bruning an additional $3,500 in lost profits.

The judgment of the district court is hereby affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MARK G. ANDERSEN, APPELLANT.

440 N.W.2d 203

Filed May 19, 1989. No. 87-1133.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Speedy Trial: Waiver.** A defendant may waive his right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1985) so long as he is properly advised of his right to a speedy trial and the waiver is entered voluntarily, knowingly, and intelligently.
3. **Speedy Trial: Waiver: Proof.** Once a trial court has accepted a defendant's waiver of his statutory right to a speedy trial, the burden of proving that the waiver is invalid is upon the defendant to show by a preponderance of the evidence that he did not voluntarily, knowingly, or intelligently waive his right to a speedy trial.
4. **Speedy Trial: Waiver.** A defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried. The defendant shall serve a copy of the written request for trial upon the prosecutor. The clerk of the court, immediately upon receipt of the request for trial, shall also forward a copy of it, together with the date of filing,

to the trial judge and to the prosecutor's office. From the date the defendant files his written request for trial, the 6-month period for the State to bring a defendant to trial provided in Neb. Rev. Stat. § 29-1207 (Reissue 1985) shall begin anew.

5. **Constitutional Law: Statutes: Speedy Trial.** The constitutional right to a speedy trial and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1985) exist independently of each other. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, the factors are related and must be considered together with such other circumstances as may be relevant.
6. **Constitutional Law: Speedy Trial.** Under the provisions of the U.S. and Nebraska Constitutions, the right to a speedy trial is relative and depends upon circumstances; it is not denied where the delay is satisfactorily explained by the government and the defendant was brought to trial as soon as was reasonably possible.
7. _____: _____. The right to a speedy trial is different from other constitutional rights in that deprivation of the right is not per se prejudicial to the accused, and may work to the defendant's advantage.
8. _____: _____. Barring extraordinary circumstances, a defendant's constitutional right to a speedy trial is not denied when the defendant does not want a speedy trial.
9. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and may take into consideration that the trial court has observed witnesses testifying regarding such motion.
10. **Search and Seizure: Police Officers and Sheriffs: Evidence: Proof.** If the State shows by a preponderance of the evidence that, disregarding any police misconduct in obtaining the evidence in question, the disputed or controversial evidence would have been produced or obtained by proper police investigation entirely independent of the illegal investigative conduct, then such evidence is admissible pursuant to the "inevitable discovery" doctrine. "Inevitable discovery" involves two lines of investigation, one tainted and the other lawful, but the lawful line of investigation is not consummated in production of evidence. However, by the requisite preponderance of evidence, the State must demonstrate that some lawful means of discovery, not an illegal investigation, would have produced the evidence in question, that is, such evidence inevitably would have been discovered without existence of any police misconduct.
11. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the

absence of an abuse of discretion.

12. **Trial: Joinder: Proof.** The right to separate trials is statutory and depends upon a showing that prejudice will result from a joint trial. The defendant bears the burden of proving that prejudice will result from a joint trial.
13. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
14. **Trial: Evidence: Waiver.** Introduction of evidence by the defense waives any objection to the earlier introduction of evidence on the same subject by the State.
15. **Motions for Mistrial: Appeal and Error.** A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. The decision of whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
16. **Sexual Assault: Corroboration.** In a sexual assault case the victim need not be independently corroborated on the particular acts constituting the sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
17. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
18. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for new trial is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
19. **Convictions: Witnesses: Time.** A variance in the date of the offense as testified to by the victim does not necessarily preclude conviction. This is especially true in cases where there is a minor victim who does not immediately complain to authorities.
20. **Indictments and Informations: Time: Proof: Limitations of Actions.** Where time is not an ingredient of the crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations.
21. **Jury Instructions.** It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it. However, the trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given.
22. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
23. **Sentences: Appeal and Error.** A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.
24. **Sentences.** It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Mark G. Andersen appeals his jury convictions and sentences on two charges of first degree sexual assault and three charges of sexual assault on a child. The victims were three preteenage boys in Omaha, J.M., B.T., and S.M. We affirm all of the convictions and sentences.

The charges were brought in five separate informations, which were consolidated for trial.

On each first degree sexual assault case, the defendant received an indeterminate prison sentence of 2 to 4 years, one to run consecutively to the other. On each charge of sexual assault on a child, Andersen received indeterminate sentences of not less than 1 nor more than 2 years' imprisonment. Two of the sexual assault on a child sentences were ordered to be served concurrently with a first degree sexual assault sentence. The third was ordered to be served consecutively to the first degree sexual assault sentences. Andersen's sentences total a term of not less than 5 nor more than 10 years of imprisonment.

First degree sexual assault is a Class II felony carrying a penalty of up to 50 years with a minimum of 1 year's imprisonment. Neb. Rev. Stat. §§ 28-319(1)(c) and 28-105 (Reissue 1985). Sexual penetration is an essential element of sexual assault in the first degree. A person commits sexual assault on a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older. "Sexual contact" means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Neb. Rev. Stat. § 28-318 (Reissue 1985). The crime is a Class IV

felony and carries a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both.

Andersen assigns as error that (1) he was denied a speedy trial; (2) testimony of the three victims should have been suppressed; (3) the five informations should not have been consolidated for trial; (4) the following evidence should not have been admitted: (a) testimony regarding Andersen's homosexuality and his entertainment of teenagers in his home, (b) testimony regarding Andersen's references to a movie projector and to police reports of other investigations, and (c) testimony regarding the contents of movies shown to the victims by Andersen; (5) evidence of one victim's mother's false report of a similar incident should have been admitted; (6) defendant's motions for a mistrial should have been sustained; (7) there is not sufficient corroboration of the victims' testimony; (8) defendant's motions for a directed verdict and a new trial should have been sustained; (9) the trial court failed to give the defendant's proposed instruction on his theory of the case; and (10) the trial court abused its discretion in imposing consecutive sentences.

STATEMENT OF FACTS

In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. See, *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989); *State v. Tatara*, 230 Neb. 279, 430 N.W.2d 692 (1988).

Taking the view most favorable to the State, a jury could find that the State proved the following facts beyond a reasonable doubt.

Andersen at time of trial was a 38-year-old homosexual male; his alleged victims, J.M., B.T., and S.M., testified truthfully to Andersen's sexual behavior toward them; and at the time the offenses occurred, J.M. and S.M. were each 11 years old, and B.T. was 12 years old.

All three boys testified to going to Andersen's house to spend the night. Sometimes two of the boys were alone and, at least

once, all three were in a group. Two of the boys testified that a normal evening was to watch movies on Andersen's VCR and then to go to sleep, usually in Andersen's bed. Sometimes, the boys also ate dinner with Andersen.

The boys related watching sexually explicit movies late into the night. The boys testified that when they did go to sleep, they were awakened later by Andersen's sexual advances.

J.M. testified he met the defendant through his cousin, B.T., and B.T.'s friend, S.M. J.M. told the jury that he, B.T., and S.M. spent a night at Andersen's together. There was evidence that a young girl was also present. The youngsters watched movies, then went to bed. The room in which they slept served as Andersen's living room and bedroom. Furniture included a TV, VCR, a bookshelf full of videocassettes, and one bed with a separate mattress stored underneath. On this particular evening, J.M. was sleeping on the floor in front of the television. He awoke. Andersen's hands were inside the boy's pants touching his buttocks, J.M. testified. J.M. spent one other night at Andersen's residence. He stayed awake all night and refused to return to Andersen's residence.

S.M.'s testimony corroborated the above version of the one night at Andersen's house. He also told of staying one night when B.T. was also present. After that, Andersen insisted that the boys come alone to spend the night. A typical evening for S.M. involved watching movies and going to bed. The defendant, who was naked, insisted that S.M. wear only underwear and sleep with Andersen in the bed, which was a single-sized, one-person bed.

On one occasion, S.M. awakened to an X-rated movie on the VCR and Andersen masturbating himself. S.M. told the jury Andersen also attempted to masturbate S.M. S.M. testified he stayed with the defendant many times over a period of several months and that every time, the defendant engaged S.M. in sexual acts. S.M. told the jury that the sexual activity progressed until one night S.M. was awakened when Andersen stuck his penis into S.M.'s rectum. The defendant also stuck his tongue in the boy's rectum and placed his mouth on S.M.'s penis, according to S.M.'s testimony.

B.T. also corroborated J.M.'s version of the night all three

boys stayed at Andersen's residence. As well, B.T. corroborated S.M.'s statement that Andersen insisted the boys stay with him alone. B.T. testified that when he stayed with Andersen, he too encountered sexual acts similar to those suffered by S.M.

B.T. was also required to sleep in his underwear on Andersen's one-person bed while Andersen slept naked. B.T. testified he awakened and found the defendant's hand in the boy's underwear masturbating him. Andersen also put his mouth on B.T.'s penis and inserted his own penis in B.T.'s rectum, B.T. told the jury.

B.T. testified that between June or July of 1984 and early December 1985, on almost every weekend, both he and S.M. had spent overnight with Andersen at the defendant's home. B.T. said he and S.M. visited the defendant on different nights of the weekend. B.T. testified that there was never a time when he visited Andersen overnight that a sex act did not occur. S.M. testified he stayed overnight with the defendant weekly during the summer and every other week during the school year. Andersen testified that during the year-and-a-half period, the number of times the boys stayed overnight with him may have totaled about 60.

Andersen testified in his own behalf. He corroborated the boys' testimony in substantial detail, except he denied that any sexual activity occurred between him and the boys. Andersen testified that the movies shown to the boys were R rated. He admitted that some had sexual content inappropriate for 11- and 12-year-old boys.

SPEEDY TRIAL

Andersen first claims the trial court erred in failing to dismiss the charges for lack of a speedy trial. Neb. Rev. Stat. § 29-1207 (Reissue 1985) provides that every person charged with a criminal offense shall be brought to trial within 6 months. For certain reasons the time is extended. The 6-month period commences when an information is filed. The five informations in this case were filed on January 23, 1986. On July 15, 1986, 8 days before the 6-month time period expired, Andersen filed a waiver of his statutory right to a speedy trial. The defendant filed revocations of his waiver on January 6 and 30, 1987. Trial commenced on September 8, 1987.

In alleging that his right to a speedy trial was abridged, Andersen raises three arguments: (1) that his waiver of his statutory speedy trial right was involuntary and ineffective; (2) that even if his waiver was valid, he properly revoked it, leaving the State 8 days to bring him to trial; and (3) that his state and federal constitutional guarantees of a speedy trial were violated by the unreasonable delay as alleged. We find all of these arguments to be without merit.

This court has held that a defendant may waive his right to a speedy trial under § 29-1207 so long as he is properly advised of his right to a speedy trial and the waiver is entered voluntarily, knowingly, and intelligently. See *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982). Cf., *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986); *State v. Rogers*, 208 Neb. 464, 303 N.W.2d 788 (1981). Once a trial court has accepted a defendant's waiver of his statutory right to a speedy trial, the burden of proving that the waiver is invalid is upon the defendant to show by a preponderance of the evidence that he did not voluntarily, knowingly, or intelligently waive his right to a speedy trial. See *State v. Rogers, supra*.

It is clear from the record that Andersen was told of his right to a speedy trial. It is also clear that his waiver of that right was entered voluntarily, knowingly, and intelligently.

Andersen claims he was told that if he did not waive his right to a speedy trial, he would have to be tried without a jury. This contention is not supported by the record. At the time Andersen revoked his waiver, Andersen's counsel told the trial judge that the waiver of a speedy trial was entered for the purpose of waiting for this court's decision in *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). *Carlson* involved issues which, if decided favorably to defendant Carlson, would have benefited Andersen in the instant cases. Andersen failed to meet his burden of proving invalid his waiver of his statutory right to a speedy trial.

Whether a defendant's waiver of his right to a speedy trial may be revoked or terminated has not been decided by this court. Andersen urges that a defendant should be permitted to revoke his speedy trial waiver at any time. Under Andersen's proposed rule, the State would be required to bring the

defendant to trial within the time remaining in the original 6-month calculation, subject to § 29-1207(4)(f). That subsection provides that time may be excluded from the 6-month calculation if the court finds the delay is for good cause.

The State argues that Andersen's proposed rule would permit defendants to manipulate both the State and the trial court by choosing when to waive the 6-month speedy trial right and when to revoke the waiver. Applied to the facts of this case, Andersen's proposed rule would have given the State 8 days to bring him to trial after his waiver was revoked. This would not be sufficient time to prepare a case of this magnitude for trial. Such a rule would be prejudicial to the State. We decline to adopt the defendant's proposed rule.

We hold that a defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried. The defendant shall serve a copy of the written request for trial upon the prosecutor. The clerk of the court, immediately upon receipt of the request for trial, shall also forward a copy of it, together with the date of filing, to the trial judge and to the prosecutor's office. From the date the defendant files his written request for trial, the 6-month period for the State to bring a defendant to trial provided in § 29-1207 shall begin anew.

In this case, when the time periods attributable to the defendant's pretrial motions are deleted pursuant to § 29-1207, it is clear that the State brought Andersen to trial within a 6-month period after he terminated his waiver of a speedy trial. According to the defendant's own calculations (in his brief at page 17), the trial commenced at most within 164 days, excluding defense delays, following the termination of Andersen's waiver. Andersen's statutory right to a speedy trial was not violated.

Andersen also argues that his state and federal constitutional rights to a speedy trial were violated. The constitutional right to a speedy trial and the statutory implementation of that right under § 29-1207 exist independently of each other. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must

approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, the factors are related and must be considered together with such other circumstances as may be relevant. Under the provisions of the U.S. and Nebraska Constitutions, the right to a speedy trial is relative and depends upon circumstances; it is not denied where the delay is satisfactorily explained by the government and the defendant was brought to trial as soon as was reasonably possible. See, *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982); *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct 2182, 33 L. Ed. 2d 101 (1972).

As already discussed, any delay in bringing Andersen to trial was occasioned by the defendant's waiver of his right to a speedy trial for strategic reasons. After Andersen revoked his waiver, the case proceeded to trial in a normal manner and without unreasonable delay. Andersen primarily argues that he was prejudiced by the deaths of his original attorney and of K.E., S.M.'s father and a potential defense witness. Andersen also argues that he was prejudiced in that his career as a real estate appraiser suffered, leading to financial hardship.

The right to a speedy trial is different from other constitutional rights in that deprivation of the right is not per se prejudicial to the accused, and may work to the defendant's advantage. See *Barker v. Wingo, supra.* Delay is a common defense tactic and was employed in this case. During a delay, witnesses sometimes become unavailable. Memories of other witnesses fade. If the witnesses support the prosecution, its case may be weakened, a distinct advantage for the defense. However, there is an equal possibility that the defense could be weakened by loss of witnesses.

In this case, the defense employed a tactical delay. It may have backfired in that the defense attorney and one witness died. This is a risk that is taken by whoever occasions the delay, whether it be prosecution or defense. Further, the record does

not reflect that the deaths of these two individuals had any appreciable effect on the defendant's case.

Lynn Carey, the defendant's original attorney, suffered from cancer and died in December of 1986. His death was not unexpected, and Andersen's present attorney entered his appearance in the case in January of 1987. Andersen makes no showing that present defense counsel was not as effective or as familiar with the case as Carey would have been had he lived and tried the case.

Similarly, the death of K.E. did not seriously weaken Andersen's defense. According to Andersen, his friend K.E. could have impeached the testimony of S.M. and his mother, S.E., K.E.'s wife. Through K.E.'s testimony, Andersen claims, he would have established that S.M.'s testimony was the result of coaching by his mother. The theory that S.M. was coached by his mother in order to obtain money from the defendant was raised by defense counsel during cross-examination of S.E. and also through the testimony of Glen Woodruff, a friend of K.E.'s. Clearly, the jury chose not to believe this theory. K.E.'s testimony would have only been cumulative to Woodruff's testimony.

Andersen was not prejudiced either by the death of his attorney or by the death of K.E.

Andersen claims that the delay in his being tried brought personal and professional hardship on him which was prejudicial. All persons accused of a crime suffer some detrimental impact. The record shows that, at least between July of 1986 and January of 1987, Andersen did not want a speedy trial. Barring extraordinary circumstances, a defendant's constitutional right to a speedy trial is not denied when the defendant does not want a speedy trial. See *Barker v. Wingo, supra.* In *Barker,* the defendant was not brought to trial for more than 5 years after he was arrested. He waived his right to a speedy trial for strategic reasons. As here, the defendant Barker was awaiting the outcome of another trial and appeal therefrom. The U.S. Supreme Court held that under these circumstances the State did not deny Barker a speedy trial.

Under the circumstances of this case, Andersen was denied neither his statutory nor his constitutional right to a speedy

trial.

INEVITABLE DISCOVERY OF WITNESSES

Andersen's second assigned error claims the trial court erred in finding that B.T. inevitably would have been discovered and would have led officers to both S.M. and J.M.

On December 3, 1985, in connection with an unrelated child pornography investigation, the defendant's residence was searched by law enforcement officers and an address book confiscated. In the address book, officers found the name of K.E., S.M.'s father. The officers contacted K.E. and interviewed S.M. S.M. led officers to his friends B.T. and J.M. At that time, S.M. did not tell the officers that Andersen had sexually assaulted him. The next day S.M. told his mother of the assaults, and she called the police.

Andersen filed a motion to suppress the items taken during the search of his residence. After a hearing, the trial court ruled the search was illegal and ordered the address book suppressed. Later, Andersen filed a motion to dismiss the informations in the instant cases, claiming the testimony of B.T., J.M., and S.M. should be suppressed. The defendant claimed it was fruit of the illegal search. The trial court treated this pleading as a motion to suppress the testimony of the three boys.

At the hearing regarding suppression of the boys' testimony, Police Officer Robert Sklenar testified he was assigned to investigate a child pornography ring during the latter part of 1985. The investigation began on November 11, 1985, and involved 22 suspects, including the defendant, Andersen. Officers interviewed 130 potential witnesses and suspects between November 11 and December 4, 1985.

On November 25, 1985, police received a report from a neighbor that young boys frequented Andersen's residence and that the neighbor suspected illegal activity. The neighbor recognized one of the boys, B.T., and gave his name to police. Officer Sklenar testified that because of this report, B.T. would have eventually been interviewed in the course of the child pornography ring investigation.

When B.T. was interviewed, he related his sexual contact with the defendant. B.T. also gave the interviewing officer the names of S.M. and J.M. Sklenar testified that S.M. and J.M.

would have been interviewed in the routine course of the continuing investigation. On cross-examination, Sklenar admitted that not all people known to police concerning the investigation were interviewed.

The trial court found that the police would have interviewed B.T. in the normal course of a child pornography ring investigation and that B.T. would have led officers to J.M. and S.M. The court ruled that the boys' testimony was admissible because it would have inevitably been discovered. Andersen argues that the State failed to meet its burden of proving by a preponderance of the evidence that the police would have interviewed B.T., absent the address book.

In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and may take into consideration that the trial court has observed witnesses testifying regarding such motion. *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989); *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988).

The "inevitable discovery" doctrine was adopted by the U.S. Supreme Court in *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The doctrine applies where

> "[t]he challenged evidence is in some sense the product of illegal governmental activity." [Citation omitted.] Of course, this does not end the inquiry. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.

(Emphasis omitted.) 467 U.S. at 444.

In a single-judge opinion, pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985), Judge Shanahan analyzed and explained the *Nix* rule in *State v. Evans*, 223 Neb. 383, 389 N.W.2d 777 (1986). His reasoning, which we adopt, stated:

> If the State shows by a preponderance of the evidence that, disregarding any police misconduct in obtaining the

> evidence in question, the disputed or controversial evidence would have been produced or obtained by proper police investigation entirely independent of the illegal investigative conduct, then such evidence is admissible pursuant to the "inevitable discovery" doctrine. . . . "[I]nevitable discovery" involves two lines of investigation, one tainted and the other lawful, but the lawful line of investigation is not consummated in production of evidence. However, by the requisite preponderance of evidence, the State must demonstrate that some lawful means of discovery, not an illegal investigation, would have produced the evidence in question, that is, such evidence inevitably would have been discovered without existence of any police misconduct.

(Emphasis omitted.) *Id.* at 391-92, 389 N.W.2d at 783.

The facts show two distinct lines of investigation leading to B.T. One, the search of Andersen's residence and confiscation of the address book, was unlawful. The other, the continuing routine investigation of the child pornography ring, was legal. Andersen argues that because not all possible witnesses were interviewed, the State could not prove that B.T., S.M., and J.M. would have been interviewed as part of the pornography ring investigation.

This argument ignores that the State need only prove by a preponderance of the evidence that the boys would have been discovered through the legal investigation. The child pornography ring investigation was obviously extensive and involved many victims and suspects, including the defendant. Sklenar testified that one purpose of the investigation was to obtain names of possible child victims of sexual abuse. Sklenar also testified that the information with respect to B.T. was not a "dead end" because there were no reports of failed attempts to locate him. In the finding that B.T., S.M., and J.M. would have eventually been interviewed in the routine course of the child pornography ring investigation, we cannot say the trial court was clearly wrong.

CONSOLIDATION OF INFORMATIONS

Andersen next claims the trial court erred in granting the

State's motion to consolidate five informations for trial. All of the charges alleged Andersen committed improper sexual contact at his home with three preteenage boys. There was similarity of time, place, and acts, and all were interrelated. Moreover, each of the boys' testimony would be admissible in five separate trials, for corroborative purposes and to show Andersen's motive, intent, and design.

A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial. Neb. Rev. Stat. § 29-2002 (Reissue 1985). The right to separate trials is statutory and depends upon a showing that prejudice will result from a joint trial. The defendant bears the burden of proving that prejudice will result from a joint trial. See, *State v. Thompson,* 231 Neb. 771, 438 N.W.2d 131 (1989); *State v. Clark,* 228 Neb. 599, 423 N.W.2d 471 (1988); *State v. Vrtiska,* 225 Neb. 454, 406 N.W.2d 114 (1987).

After a hearing at which no evidence was presented, the trial court held that Andersen had not met his burden of proving that he would be prejudiced by the joinder. The joinder was granted.

The trial court did not abuse its discretion in ordering that five informations against the defendant be consolidated for trial.

ADMISSION OF EVIDENCE

Four of defendant's assigned errors complain of rulings by the trial court on the admissibility of evidence. We begin the discussion of these assignments by remembering that it is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Blair,* 230 Neb. 775, 433 N.W.2d 518 (1988); *State v. Methe,* 228 Neb. 468, 422 N.W.2d 803 (1988).

Defendant complains that the State was permitted to improperly present evidence of (1) his homosexuality, (2) the sexual content of movies he showed to the victims, and (3) the fact that he had previously entertained teenage boys in his home. In his case in chief, Andersen's testimony verified the

State's evidence in regard to these items. He also admitted the sexual content of some of the movies the boys viewed in his residence was not appropriate for young boys. Introduction of evidence by the defense waives any objection to the earlier introduction of evidence on the same subject by the State. See, *Johnson v. Airport Authority*, 173 Neb. 801, 115 N.W.2d 426 (1962); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984). Even standing alone, the State's evidence was properly admissible because it corroborated the boys' testimony.

That the defendant is a homosexual and had permitted movies with questionable sexual content to be viewed by the victims before the defendant committed sexual acts upon them was relevant evidence. The evidence tended to show the defendant's motive, preparation, plan, and intent to commit the crimes at issue and was admissible. Andersen's sexual preference for males enhances the credibility of the victims' testimony that the defendant's acts were committed for sexual gratification.

The trial court did not abuse its discretion in admitting the State's evidence of Andersen's homosexuality, of prior entertaining of young boys in his home, or of the content of the films shown to the victims.

Andersen also complains that the trial court improperly admitted testimony of S.E., S.M.'s mother. Before trial, Andersen objected to the endorsement of S.E. as a witness. He argued that her testimony regarding allegedly pornographic materials taken to her home by Andersen would be irrelevant. The court permitted the endorsement.

S.E. testified, "He [Andersen] said that we could get in trouble because he had brung over a projector to our house and asked us to sell it for him." Andersen argues that statement improperly refers to pornography. S.E.'s testimony made no reference to pornography brought to her home by Andersen. The assignment of error in regard to S.E.'s testimony has no merit.

Andersen also complains that the trial court improperly permitted endorsement of two witnesses named French and Dawson, who were to testify as to a statement made by Andersen regarding police reports of other investigations. On

cross-examination, Andersen admitted he had made the statement. Witnesses French and Dawson were not called. This assignment of error has no merit.

In his last assigned error relating to the admission of evidence, Andersen claims the trial court erred in refusing to permit certain evidence of alleged false reporting. During cross-examination, Andersen sought to elicit testimony from the victim S.M. that his mother made a false report of a sexual assault incident to police. An offer of proof claimed that 3 years prior to the instant trial, S.E. reported to police that her husband, K.E., had sexually molested her niece. It was further claimed that S.E. later recanted the story and admitted she had lied.

The trial court refused to permit questioning of S.M. along this line because it was "very collateral" to the issue at hand. Andersen argues that this questioning was necessary to bolster his contention that the victims had fabricated their stories of his assaulting them. The fact that a mother fabricated a story is not an indication that 3 years later her son fabricated a similar story.

In any event, police reports of the alleged false reporting by S.M.'s mother were introduced in evidence. They show that her niece claimed that S.E.'s husband sexually molested the niece. They further show that the niece told S.E. about the matter, that S.E. and her husband argued, and that her husband claimed that S.E. told him that she was "going to get him [her husband] in trouble and accuse him of child molesting." The husband called the police. The niece told police her uncle had put his hand down the back of her panties and rubbed her buttocks area. At that time, S.E. told police that the niece had related to her the same story that the niece had given the police. After the uncle was arrested, the niece recanted her story. S.M. was aware of the niece's accusation at the time it occurred.

We cannot say that the trial judge abused his discretion in refusing to permit Andersen to question S.M. about his mother's alleged fabricated story.

The trial court did not abuse its discretion in any of its rulings on the admission of evidence. The defendant's assignments of error regarding evidentiary rulings are without merit.

MOTION FOR MISTRIAL

Through the course of trial, the defendant made several motions for a mistrial. All were overruled. Andersen contends the trial court should have sustained his mistrial motions. He argues that several instances of alleged prosecutor misconduct occurred and that, while one incident may not be sufficiently prejudicial to grant a mistrial, the cumulative effect was prejudicial, and a mistrial was in order.

A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. The decision of whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. See, *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988). The instances described by the defendant were not prosecutor misconduct.

The court sustained the defendant's pretrial motion to prevent references to pornography and to other defendants charged with child pornography crimes. Several of the defendant's arguments for a mistrial are based upon the erroneous belief that the trial court prohibited the prosecution from bringing before the jury references to other children. Although Andersen attempted to keep from the jury references to other young boys' having visited his residence, the court permitted some of this type of evidence to be received in the trial. Again, the defendant, on direct examination, testified that young boys visited his residence, and thereby waived any objection to such evidence.

Andersen further argues that several answers to prosecution questions were grounds for a mistrial because they improperly referred to "porn" or to other defendants. At one time Officer Sklenar testified that he had interviewed additional witnesses and possible victims. The defendant complains that this is a reference to other defendants and a pornography "ring." However, the question asked of Sklenar was specifically limited to his investigation of "this case." Andersen also objects to statements regarding "porn" and the naming by S.M. during redirect examination of defendants charged with child

pornography crimes. Objections to these statements were overruled by the trial court because the defendant had questioned the witness on these points during cross-examination. During direct examination, S.E. mentioned that police had "started arresting from Lincoln to Omaha." Defendant's objection to the answer as not responsive to the question was sustained, and the jury was admonished to ignore the statement. All of the above rulings by the trial court were correct.

Finally, Andersen argues that a mistrial should have been granted because the prosecutor improperly inserted his opinion into questioning and made prejudicial innuendoes regarding the defendant. None of these incidents were properly objected to by Andersen. In his brief, Andersen has taken the statements out of context. Read in context, they are not improper, nor are they prejudicial.

Whether considered individually or cumulatively, these incidents are not prejudicial to the defendant and did not require the granting of a mistrial.

There was no abuse of discretion by the trial court in its refusal to sustain Andersen's motions for a mistrial.

CORROBORATION

Andersen claims the trial court erred by finding that there was sufficient corroboration of the victims' testimony. In a sexual assault case the victim need not be independently corroborated on the particular acts constituting the sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue. *State v. Narcisse,* 231 Neb. 805, 438 N.W.2d 743 (1989); *State v. Antillon,* 229 Neb. 348, 426 N.W.2d 533 (1988).

The corroboration requirement was eliminated by the Legislature in 1989 Neb. Laws, L.B. 443, passed with an emergency clause and signed by the Governor on March 14, 1989. However, we find that the evidence in this case is clearly sufficient to corroborate the victims' testimony about their sexual assaults by the defendant.

How evidence of Andersen's homosexuality, of movie contents, and of other boys' being in Andersen's home

corroborates the victims' testimony has already been discussed. Each boy's testimony corroborates the testimony of the other two. All three boys testified as to the defendant's invitations to stay overnight and the fun places the defendant took them. Each boy related the sexually explicit content of the movies they were shown until late at night and testified of being awakened by the defendant's sexual acts. Two victims testified that the defendant required them to remove all but their underwear before sleeping in his bed with him. This evidence establishes a "modus operandi" and helps corroborate the victims' testimony. Andersen's testimony in large part also corroborated the victims', except he denied sexual misconduct.

The trial court was correct in finding that sufficient corroboration existed.

MOTIONS FOR DIRECTED VERDICT AND FOR NEW TRIAL

The defendant claims the trial court erred in overruling defendant's motions for a directed verdict and for a new trial. Andersen argues that the case should have been dismissed, or a new trial granted, because of the discrepancy in the victims' testimony regarding the date of the assaults.

In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Diesing*, 231 Neb. 132, 435 N.W.2d 190 (1989); *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988).

The granting of or refusal to grant a motion for new trial is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988); *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987).

Because Andersen makes the same arguments for both motions, they will be discussed together. The defendant's argument rests primarily upon the date discrepancy in the boys' testimony. J.M. testified that he was assaulted by the defendant in May of 1985. His testimony is that both S.M. and B.T. were

also staying with the defendant that night. His testimony is supported by that of his father. S.M. and B.T. also told of being entertained by the defendant when J.M. was present; however, they both testified that the incident occurred in July of 1984. All three boys testified that this night was the first time any of them had stayed overnight with the defendant. Other than the date, the boys' testimony of the details of the event are much the same. Andersen argues that the date discrepancy is so material as to defeat his convictions.

A variance in the date does not necessarily preclude conviction. See *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985). This is especially true in cases where there is a minor victim who does not immediately complain to authorities. *Id.*

J.M. was assaulted only once, visited the defendant's residence a second time, and thereafter refused to stay overnight at Andersen's residence. S.M. and B.T. were assaulted numerous times over a period of many months. These three preteenage boys were forced to deal with a variety of emotions and fears. It is understandable that they would not be able to remember the exact dates of the assaults. Where time is not an ingredient of the crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations. *State v. Wood, supra.* Clearly, the assaults on these boys occurred sometime between July 1984 and November of 1985. Andersen was charged by informations on January 23, 1986, well within the 3-year statute of limitations for any possible assault date. See Neb. Rev. Stat. § 29-110 (Reissue 1985).

We have reviewed each of Andersen's motions for a directed verdict and a new trial. The trial court was correct in denying them.

JURY INSTRUCTION

Andersen claims the trial court erred in refusing to give his requested instruction on the defendant's theory of the case. The requested instruction stated that it was defendant's theory that each of the victims had "fabricated or [had] materially mis-stated facts which constitute elements of the count herein." Basically, the proposed instruction concerns the credibility of the witnesses. The trial court refused to give this instruction

because its substance was covered by other instructions being given and because it was too broad. The court reasoned that a witness could unintentionally misstate facts without an acquittal being required.

It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it. *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, the trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given. *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980); *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977). Jury instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Cole*, 231 Neb. 420, 436 N.W.2d 209 (1989); *State v. Reeves, supra*.

Instruction No. 12, given by the court, is the standard approved instruction on credibility of witnesses. It instructs the jury to consider, among other things, the witnesses' interest in the result of the suit; apparent bias; ability to remember and relate occurrences accurately; the extent of corroboration by other credible evidence; the reasonableness or unreasonableness of their statements; and all other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses. This instruction covers completely the substance of Andersen's requested instruction. Defendant's theory of the case could be argued based upon this instruction and the evidence.

The trial court committed no error by refusing to give Andersen's proposed jury instruction.

CONSECUTIVE SENTENCES

In his final assignment of error, Andersen asserts that the trial court erred in imposing consecutive sentences. Andersen argues that the consecutive sentences are excessive because his victims had been subjected to this type of conduct before they met him.

A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of

discretion. *State v. Camacho*, 231 Neb. 522, 437 N.W.2d 151 (1989); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Tweedy*, 196 Neb. 246, 242 N.W.2d 626 (1976). It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively. *Benzel, supra*; *Tweedy, supra*. The maximum possible penalty for Andersen was 115 years in prison and a $30,000 fine. When Andersen's sentences are added together, he will serve an indeterminate term of not less than 5 nor more than 10 years in prison. His sentences are within the statutory limits.

On the basis of two psychiatric examinations of the defendant, the trial court found that Andersen was not a mentally disordered sex offender. Neither the trial record nor the presentence investigation reflects any mitigating factors justifying lesser sentences for Andersen's criminal conduct as determined by the jury in its verdicts. If anything, considering the magnitude, number, and frequency of the crimes the record shows Andersen committed, and considering the impact upon the victims, as shown by the presentence investigation, more severe sentences might well have been justified.

Sexual assault on a child is an extremely serious and deplorable crime. Andersen's suggestion that he should receive a lesser penalty because he chose as his victims children whom he claimed had already been subjected to sexual contact is abominable. Andersen, in his brief, points to nothing in the record indicating that two of his victims were, in fact, previously subjected by others to the type of sexual abuse that Andersen inflicted upon them.

The evidence reflects that the third victim, when he was 7 or 8 years old, was molested once when a man placed his finger in the boy's rectum.

The trial court did not abuse its discretion in imposing some consecutive sentences.

We find that none of Andersen's assigned errors have merit. The convictions and sentences of the trial court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN D. CRIDER, APPELLANT.
440 N.W.2d 219

Filed May 19, 1989. No. 88-036.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

P. Stephen Potter for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant appeals from the judgment and sentence imposed on him by the district court for Dawson County, Nebraska. The record shows that a second amended complaint was filed against defendant in the county court for Dawson County, charging defendant, in 12 counts, with various crimes of theft by deception, in violation of Neb. Rev. Stat. § 28-512(3) (Reissue 1985), and of theft, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1985). After a preliminary hearing, defendant was bound over to the district court for Dawson County. There, an information in 12 counts was filed, charging the same violations. The first five counts alleged offenses constituting Class IV felonies, and the last seven counts alleged Class I misdemeanors. All involved theft or theft by deception.

Defendant was arraigned on the above charges in district court on July 10, 1987. The information was read to defendant, and the nature of the charges filed was generally explained to defendant by the court. Defendant pled not guilty, and the court set the case for trial on October 5, 1987.

On October 2, 1987, defendant, his counsel, and the county attorney prosecuting the charges appeared before the court. They announced to the court that a plea bargain had been reached. A petition to enter a plea of no contest was signed by defendant and filed in the district court. Pursuant to the written terms of this petition, the State agreed to dismiss 11 of the pending 12 counts, and defendant agreed to plead no contest to

one of the counts. The parties also agreed that the State would file no additional charges arising out of "these transactions" and that the State could ask for restitution on all the charges.

Pursuant to the agreement, count III of the information was read to defendant. The court then fully explained to defendant all the constitutional rights he would be giving up if he entered a plea to count III. The rights explained by the court to defendant comported fully with the requirements set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

A factual basis for the plea was then set out by the county attorney. This statement showed that defendant was an officer of an organization called New Life Jail Ministries and had the duty of keeping the account records of the organization. The sum of $3,730.40 was found to be missing from the organization's accounts. On February 20, 1987, defendant paid himself the sum of $305 by check. This payment was not authorized and was the subject of the criminal count to which defendant pled no contest. Defendant questioned the total amount taken but admitted that he had, in effect, stolen $305 on the date in question and that those facts made him guilty of the Class IV felony to which he pled no contest.

The court found that defendant entered his plea knowingly, voluntarily, and intelligently and that there was a factual basis for the plea; accepted the plea; and found defendant guilty as charged. The court then dismissed the remaining 11 counts.

On December 11, 1987, the court sentenced defendant to 1½ to 4 years in prison and ordered him to pay restitution in the amount of $6,468.66. Defendant's motion for new trial was overruled, and defendant timely appealed to this court.

In this court, defendant assigns as error three actions of the trial court: (1) failing to properly arraign the defendant, (2) failing to advise defendant of his constitutional rights at the time of his arraignment, and (3) abusing its discretion at the time of defendant's arraignments.

It is difficult to ascertain the argument defendant makes in support of his assignments of error. It would appear that, without saying so, defendant is contending that since defendant was not advised of all of his constitutional rights at the arraignment at which he pled not guilty to the 12 charges

against him, his later plea of no contest to one count was somehow flawed. There was no error in defendant's arraignment at which he entered a plea of no contest. Defendant's appeal is patently frivolous, and his sentence is affirmed.

AFFIRMED.

LOIS T. PETRASHEK, APPELLANT, V. WILLIAM L. PETRASHEK, APPELLEE.

440 N.W.2d 220

Filed May 19, 1989. No. 88-451.

1. **Divorce: Appeal and Error.** In an appeal in an action for dissolution of marriage, the Supreme Court reviews the record de novo to determine if the district court abused its discretion. In the absence of such an abuse, the trial court's findings will not be reversed. When the evidence is in conflict, this court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another.
2. **Child Custody.** Ordinarily, legal custody of children should not be placed in the court unless both parents are unfit or the best interests of the children, in regard to custody, are not clear.
3. _____. Joint custody of minor children is not favored, and, generally, such arrangements should be avoided.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Affirmed as modified.

Louie M. Ligouri for appellant.

No appearance for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage.

The parties were married December 5, 1969, and have three children, Teresa Marie, born May 18, 1972; Roxane Le, born August 2, 1973; and Ethan William, born April 6, 1982.

The petitioner, Lois T. Petrashek, filed a petition September 28, 1987, for separate maintenance. The respondent, William L. Petrashek, filed a cross-petition October 30, 1987, alleging that the marriage was irretrievably broken, and praying for dissolution of the marriage. Both parties requested custody of the children.

The parties and their children have lived in their present home in Table Rock, Nebraska, for about 1 1/2 years. They purchased the home for $9,500, and approximately $7,000 is owed on the mortgage. The monthly payment on the mortgage is approximately $185. The parties valued their general household goods at $1,000. They own four automobiles and a truck, which have a value of approximately $2,800. They have three checking accounts, which are of minimal value.

At the time of trial, the respondent was employed as an automobile mechanic and was earning take-home pay of $499.87 every 2 weeks. He carries health insurance, for which he pays about $40 per month and his employer pays about $157 per month.

The respondent has tools used in his employment, which he valued at $1,500, and other equipment which he valued at $500.

The petitioner wife has had the primary responsibility of homemaking and caring for the children. At the time of the trial, she was employed as a nurse's aide with a net income of about $325 per month. In 1985, her income was $1,269; in 1986, it was $105; and in 1987, it was $974. The petitioner testified that she was looking for additional hours of employment, has done bookkeeping, and has worked as a dental assistant, and said that "I think I can learn to do about anything."

Following the hearing on April 29, 1988, the trial court dissolved the marriage, retained legal custody of the children in the court, and provided that the temporary custody and possession of the family home be vested in the minor children and that all household goods remain in the home. The petitioner was awarded the right to live in the home for a period of 3 months, beginning May 1, 1988. As of August 1, 1988, the respondent was entitled to live in the home with the children for 3 months. Then, beginning on November 1, 1988, the petitioner had the right to live in the home with the children for 6 months

and to alternate every other 6 months thereafter with the respondent, until the two minor daughters of the parties become of age, marry, die, become emancipated, or are out of school. The temporary care, custody, and control of the children was ordered to "rest in whichever party is living in the house at the times above stated." When the last of the two minor daughters leaves the household, the petitioner was to be awarded physical custody of the son and sole possession of the home until the son becomes of age, marries, dies, is emancipated, or leaves the home.

The parent who has possession of the home during his or her occupancy is required to make the $185 house payment and pay for the utilities and general upkeep of the home while in possession. Taxes and insurance on the house are to be divided by the parties.

The family home was ordered to be sold at the time the last of the minor children becomes of age, marries, dies, becomes emancipated, or leaves the home, the proceeds to be applied to the payment of the mortgage, after which any excess is to be divided equally between the parties.

The respondent was ordered to pay $129 per month per child in support, and the petitioner was ordered to pay $58 per month per child in support. Respondent was ordered to maintain the health insurance he was carrying on each child until the child becomes of age, marries, dies, becomes emancipated, or leaves the home.

The petitioner was awarded the 1977 Pontiac automobile, subject to any indebtedness, and the 1968 Mercury was awarded to the respondent. The petitioner was awarded the cash value of her life insurance policy. The tools owned by the respondent and used in his trade were awarded to him. The remainder of the personal property was to be sold to pay the debts of the parties.

No attorney fees were awarded, and petitioner was ordered to pay the court costs. The trial court also fixed the rights of visitation of the parties.

The petitioner has appealed and contends the trial court erred in retaining legal custody of the children in the court and awarding alternating possession to the parties, in the division of

real and personal property, and in failing to allow alimony and attorney fees to the petitioner.

In an appeal in an action for dissolution of marriage, the Supreme Court reviews the record de novo to determine if the district court abused its discretion. In the absence of such an abuse, the trial court's findings will not be reversed. When the evidence is in conflict, this court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another. *Rogers v. Rogers*, 231 Neb. 313, 435 N.W.2d 915 (1989); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

In regard to child custody, Neb. Rev. Stat. § 42-364 (Reissue 1988) provides that

> [w]hen dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of the court or third parties. . . . Custody and visitation of minor children shall be determined on the basis of their best interests.

Ordinarily, legal custody should not be placed in the court unless both parents are unfit or the best interests of the children, in regard to custody, are not clear. Although § 42-364(3) provides that "[t]he court may place the custody of a child with both parents on a shared or joint-custody basis when both parents agree to such an arrangement," joint custody of minor children is not favored, and, generally, such arrangements should be avoided. See, *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987); *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985); *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984). The parties in this case did not agree to a shared or joint custody basis.

Although the trial court made no specific finding regarding the fitness of the parties, it is apparent that it considered both parties fit and that the record supports such a finding. Under the facts and circumstances in this case, we believe the custody of the children should be awarded to the petitioner with rights of visitation in the respondent as provided in the decree of the trial court.

The award of child support to be paid by the respondent in the amount of $129 per month per child is affirmed. The award of child support to be paid by the petitioner is canceled.

The award of "temporary custody and possession" of the family home to the minor children is impractical and cannot be affirmed. Possession of the family home is awarded to the petitioner as long as she and the children live in it, or until the youngest child becomes 18 or leaves the home, whichever is sooner. The respondent shall pay the monthly mortgage payment, the taxes, and the insurance. When the petitioner moves from the home, or the youngest child becomes 18 or leaves the home, the property shall be sold, the proceeds to be used to pay the mortgage indebtedness and any balance remaining to be equally divided between the parties, except the petitioner's share of the proceeds shall not exceed $1,000.

The award to the petitioner of the 1977 Pontiac automobile and the cash value of her life insurance policy is affirmed. All household goods are awarded to the petitioner.

The award of the tools and equipment to the respondent is affirmed, and he shall receive the other automobiles, the truck, and all of the bank accounts.

The respondent shall pay all the indebtedness of the parties, except the $750 unsecured debt of the petitioner and the real estate mortgage which shall be paid as ordered above.

Costs are taxed to the respondent, including an allowance of $250 to the petitioner for the services of her attorney, the latter to be paid within 3 years of the date of the filing of the mandate of this court in the district court.

The judgment of the district court is modified as provided in this opinion, and as so modified is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. SALVADORE J. DIBAISE, APPELLANT.

440 N.W.2d 223

Filed May 19, 1989. No. 88-569.

Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error. In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of that evidence even though it was considered in a pretrial motion to suppress and also upon renewal of that motion at the close of the State's case, which motions were overruled.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Donald W. Kleine, of Kleine Law Office, for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a jury trial in the district court, the defendant was found guilty of theft by receiving stolen property worth more than $300 but less than $1,000, a Class IV felony. The defendant has appealed to this court, alleging as error the failure of the trial court to suppress evidence gathered pursuant to a search warrant, because the search warrant affidavit did not provide a substantial basis to conclude that probable cause existed to issue the warrant. We affirm.

On November 23, 1987, the police department of the city of Omaha received a phone call regarding an allegedly stolen motor vehicle. The anonymous caller stated he saw the defendant drive a maroon El Camino or Ranchero into his garage, and later heard through the grapevine that the vehicle had been stolen. During the course of the investigation of this call, it was discovered that on November 6, 1987, the police department had received a report that a maroon 1978 Chevrolet El Camino owned by Martin Furmanski had been stolen. After ascertaining that the motor vehicle had not yet been recovered, Officer Perales filed an affidavit and application for issuance

of a search warrant to search the defendant's house and garage.

A search warrant was obtained, and the subsequent search permitted the discovery of a 1978 El Camino in a dismantled condition in the defendant's garage. The serial number stamped on the door matched that of the vehicle reported stolen. A further search of items on the garage floor revealed an auto registration certificate and insurance cards, all of which contained the description of the stolen vehicle and the name of Martin Furmanski as the owner. At trial, Mr. Furmanski identified one of the pictures taken of this motor vehicle as depicting "what's left of my car."

Defendant's pretrial motion to suppress related to the suppression of the above-described items, as well as to some additional pictures of the vehicle and the inside of defendant's garage. At trial these exhibits were offered and received, and in each instance defense counsel stated that he had no objection to their reception. However, at the close of the State's case, defendant renewed his motion to suppress previously made before trial, which motion was overruled.

We need not consider defendant's motions to suppress. It is the rule in Nebraska that in order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of that evidence even though it was considered in a pretrial motion to suppress and also upon renewal of that motion at the close of the State's case, which motions were overruled. *State v. Davis,* 231 Neb. 878, 438 N.W.2d 772 (1989); *State v. Brockman,* 231 Neb. 982, 439 N.W.2d 84 (1989).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN P. WELSH, APPELLANT.

440 N.W.2d 225

Filed May 19, 1989. No. 88-621.

1. **Trial: Evidence: Appeal and Error.** An appellant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.
2. **Trial: Appeal and Error.** A defendant cannot complain of error which he has invited.
3. **Trial: Evidence.** When the State discovers evidence that it did not know existed, the proper procedure is to make the evidence available to defense counsel and afford the defendant an opportunity to depose the witness and conduct such additional discovery as may be necessary.
4. **Trial: Pretrial Procedure.** The trial court has broad discretion in regard to discovery orders and the failure to comply with discovery requests.
5. **Trial: Evidence: Appeal and Error.** Ordinarily, a refusal to permit the introduction of cumulative evidence is not error.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Alan G. Stoler for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, John P. Welsh, was convicted of driving on a suspended license and was sentenced to imprisonment for 1 year. He has appealed and contends the evidence was insufficient to support the conviction; he did not receive a fair trial; and the trial court erred in admitting impeachment testimony and in not admitting surrebuttal testimony.

The record shows that on November 11, 1987, four Omaha police officers had the defendant's home at 11329 Grant Circle in Omaha, Nebraska, under surveillance. Two of the officers, Kevin Donlan and Diane Thorson, were assigned to the narcotics division. They had obtained a search warrant and intended to search the defendant's residence when he returned from visiting his father in Denver, Colorado, where his father was hospitalized.

Charles Matson and Daniel Clark were uniformed field officers that had been specially assigned to the narcotics division to assist Officers Donlan and Thorson in this operation. All four officers were in plain clothes and driving unmarked cruisers.

Matson and Clark parked their cruiser on a street directly east of the defendant's house so that they had a clear view of the house and garage. It was approximately 473 feet from their cruiser to the entrance to Grant Circle and approximately 735 feet from their cruiser to the defendant's driveway. Matson and Clark were using binoculars to watch the defendant's house.

Donlan and Thorson were in a cruiser parked nearby but in a different location.

Matson and Clark had been instructed to watch for a newer model blue or gray Buick. At about 6:20 p.m. they saw such an automobile turn into Grant Circle and drive into the driveway and garage at the defendant's house. The officers then drove their cruisers to the defendant's residence, where the defendant was apprehended, the search warrant served, and the defendant arrested.

The defendant's license had been suspended for 15 years as a result of his conviction on July 11, 1986, for third offense driving under the influence of alcoholic liquor.

Matson testified that when he first saw the defendant's vehicle, he saw only one person, the driver, in the vehicle. When their cruiser reached the entrance to Grant Circle, he saw a man getting out of the automobile from the driver's side. The garage door was open and the garage was lighted.

Clark testified that he saw "him" get out of the automobile on the driver's side. Donlan testified that he saw the defendant taking items out of the automobile from the driver's side. None of the officers saw anyone, except the defendant in the automobile or the garage, walking near the house or in the vicinity.

The defendant claimed that he had been driven to Omaha by his daughter and that they had stopped at a neighbor's house. He claimed that the neighbor, Mary Riban, had driven the automobile from her house to his house and into his garage. Riban's testimony corroborated that of the defendant. The

evidence was in conflict and presented issues of fact for the jury. However, the evidence of the State was such that, if believed, it was sufficient to support a verdict of guilty beyond a reasonable doubt.

The defendant contends that he did not receive a fair trial, at least in part, because there was reference throughout the trial to narcotics and the fact that the defendant was being investigated because he was suspected of being involved in narcotics.

The trial commenced on April 29, 1988, and evidence was received without objection, on both direct and cross-examination, that the police officers were working on a narcotics investigation. An appellant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Furthermore, it appears to have been a trial tactic of the defendant to allow such evidence to be received. A defendant cannot complain of error which he has invited. *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

On the second day of the trial, the defendant moved in limine to prevent the State from "alluding to drugs" or "residue" that had been found in the defendant's house. Although this motion was overruled, the record shows no such evidence was offered by the State or received.

After the defendant had rested, the State was allowed to introduce rebuttal evidence including the testimony of Mark Sundermeier, a police officer in the narcotics division, who, apparently, was in charge of the investigation concerning the defendant. Sundermeier was called to the defendant's house by the other officers and arrived just as the search was beginning. At that time he had a conversation with the defendant in which the defendant said that "he knew he was suspended and that he shouldn't drive." Sundermeier further testified that the defendant told Sundermeier that the driving on a suspended license "was the only thing he had done wrong" and that "his daughter lived in Lincoln, Nebraska, and that he dropped her off there [and had] driven the rest of the way home from Lincoln to Omaha."

Since the defendant had not been given the *Miranda* warnings at the time the conversation with Sundermeier took

place, the State could not use the defendant's statements in its case in chief, but the evidence could be used in rebuttal as impeachment. See *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1970). Before the testimony was received, the trial court held a hearing out of the presence of the jury and determined that the defendant's statements had been made voluntarily. See *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

The record shows that the prosecuting attorney did not learn of the conversation between the defendant and Sundermeier until after the first day of the trial. The State provided the information to defense counsel on the following day, a Saturday, but defense counsel did not have an opportunity to look at the material until Sunday, the day before the trial resumed. In his opening statement to the jury, defense counsel had said that the defendant would testify. Defense counsel argued that, in effect, the defendant had been trapped and would now have to testify, although defense counsel did not know of the conversation between the defendant and Sundermeier until after the first day of the trial. The trial court offered to adjourn the trial so that defense counsel could complete any further discovery that he felt was necessary. Defense counsel did not ask for a continuance but moved for a mistrial, which motion was overruled. He also moved in limine to prevent the State from using the defendant's admissions as rebuttal evidence, but that motion was overruled also.

The record does not show any prosecutorial misconduct in regard to the Sundermeier report. As soon as the prosecuting attorney discovered that such a report existed, it was immediately made available to defense counsel.

In *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982), we held that when the State discovers evidence that it did not know existed, the proper procedure is to make the evidence available to defense counsel and afford the defendant an opportunity to depose the witness and conduct such additional discovery as may be necessary.

In the *Hardin* case, on the second day of trial, the prosecutor learned the name of a third party who was present at a conversation in which the defendant threatened to damage the

victim's home. The prosecutor called defense counsel with this information and stated that he would call the witness. Defense counsel moved for a mistrial, claiming prejudice because during opening statements defense counsel had stated that the defendant would testify on his own behalf. Although the witness was not called, a continuance had been granted to allow defense counsel to take depositions. This court found that was all the relief to which the defendant was entitled.

In this case, the defendant was given an opportunity to depose Sundermeier, but declined to do so. That was the relief to which the defendant was entitled in regard to the admission of the Sundermeier testimony.

In *State v. Surber*, 221 Neb. 714, 380 N.W.2d 293 (1986), we held that the trial court has broad discretion in regard to discovery orders and the failure to comply with discovery requests.

After the State had presented its rebuttal evidence, the defendant requested leave to offer surrebuttal testimony. Upon inquiry by the trial court, defense counsel stated that the defendant wanted to deny that he had made the statements to which Sundermeier had testified. The request was refused because the defendant had already testified in his case in chief that he had not made such statements.

The refusal by the trial court to permit the introduction of cumulative evidence is not error and does not entitle a defendant to a new trial, absent a showing of an abuse of discretion. *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983). If Welsh had been allowed to testify in surrebuttal, he would have denied driving and the conversation with Sundermeier. The record already contained those denials. His testimony would have been merely cumulative. It was not an abuse of discretion to refuse to allow Welsh to testify in surrebuttal.

There being no error, the judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I can imagine nothing more devastating to the effectiveness of counsel in a criminal case than the discovery of a surprise impeaching witness after the announcement in an opening statement that the defendant would testify.

To eliminate the "game theory" of trials, both civil and criminal, the discovery process has taken root in our trial practice.

In a civil case a continuance might very well cure the use of the previously undisclosed evidence. In a criminal case, bearing as it does in this case on the sixth amendment right to effective counsel, the evidence should not have been admitted, or having admitted the evidence, the court should have granted a mistrial.

CAPORALE and GRANT, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. BROWN, APPELLANT.

439 N.W.2d 792

Filed May 19, 1989. No. 88-721.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly wrong.
2. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.
3. _____: _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.
4. **Criminal Law: Police Officers and Sheriffs: Search and Seizure: Motor Vehicles: Evidence.** Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

NORTON, D.J.

The defendant, William J. Brown, was convicted by a jury of the crime of possession of a firearm by a felon, and was sentenced to a term of imprisonment in the Nebraska Penal and Correctional Complex. He appeals to this court, alleging error on the part of the trial court in overruling his motion to suppress evidence obtained at the time of an investigatory stop. We affirm.

At approximately 2 a.m. on May 2, 1988, Officer Robert Vondrasek II of the Omaha Police Division was sitting in his police cruiser, which was parked at the intersection of 30th and Evans Streets in Omaha. At that time, he heard a number of shots being fired from a direction south of the location where he was parked. Officer Vondrasek had been employed by the Omaha Police Division for about 4 1/2 years at that time and was familiar with the sound caused by the firing of handguns and rifles. He later testified that these shots (between 8 and 15) sounded like pistol fire. He believed the shots were being fired in the area of 30th and Bedford Streets, which was approximately four blocks from his parked position. He proceeded to that area, arriving there between 15 and 30 seconds later.

Upon arrival, Officer Vondrasek observed, on the east side of 30th Street, three cars parked in a parking lot. Two of the cars appeared to be unoccupied. The third, a white Volkswagen Dasher, was occupied by two persons seated in the front seats, and a third person was entering the back seat. As Vondrasek approached the Volkswagen, it began to move. When Vondrasek's cruiser reached a point 20 to 30 feet west of the

Volkswagen, it stopped. Vondrasek observed no other persons or activity in the area at that time. He ordered the occupants of the Volkswagen to put their hands in sight, at which time they complied and got out of the car. He observed the defendant to be the driver. He exited his cruiser and pointed his revolver at the three individuals. Shortly thereafter, other police officers arrived, and together with Vondrasek they conducted a pat-down search of the three individuals for weapons. None were found. At this time Vondrasek looked into the Volkswagen with his flashlight for the purpose of locating possible weapons. It was then his belief that the occupants of this car were involved in the firing of the shots which he had heard. Lying in plain view on the floor of the back seat, he saw a cylinder for a .22-caliber revolver, which appeared to have rounds in it, and also saw what was later determined to be 15 rounds of live .22-caliber ammunition. At that time the party who had occupied the back seat was handcuffed, and while continuing to detain the other two, Vondrasek, together with Officer Petersen, one of the other officers at the scene, began a search of the vehicle, starting at the passenger-side rear door. Eventually, two loaded .32-caliber revolvers were discovered, one under the driver's seat and one under the front passenger's seat, together with the rest of the .22-caliber revolver which was discovered in the rear passenger area. Subsequently, the defendant was arrested.

At the time of the hearing on the motion to suppress, Officer Vondrasek also testified that there were numerous businesses located in the area of 30th and Bedford but that none were open at that time of the morning; that as he approached the stop area on 30th Street, he saw no other cars leaving in any direction; that he believed that the .22-caliber cylinder that he saw lying on the floor of the Volkswagen was involved in the gunshots that he had heard; and that at the time of the stop and search, he believed the occupants of the Volkswagen to be potentially dangerous.

The district court overruled the defendant's motion to suppress the evidence seized at the time of the stop, finding the search to have been conducted with sufficient probable cause "to believe that the defendant had committed or was committing a criminal offense" and, further, that the search of

the automobile was the result of a lawful stop. At the trial, the defendant's objection to the admission of the evidence obtained as a result of the investigatory stop and subsequent search was properly preserved for this appeal.

In determining the correctness of the trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Holman*, 229 Neb. 57, 424 N.W.2d 627 (1988). A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *State v. Kuil*, 231 Neb. 62, 434 N.W.2d 700 (1989). Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior. *State v. Kuil, supra*. Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *State v. Hansen*, 221 Neb. 103, 375 N.W.2d 605 (1985).

Considering all of the evidence produced at the hearing on the motion to suppress, it cannot be said that the trial court's findings of fact and conclusions reached therefrom are clearly wrong in this case. The incident which precipitated the stop, detention, search, and subsequent arrest occurred in the early morning hours. The officer involved was an experienced officer with the Omaha police force and was familiar with the sound of

pistol fire. He arrived at the place from where he believed the gunshots to have originated less than 1 minute after hearing the same. The area was deserted except for three automobiles in a parking lot, two of which were not occupied. The third contained three individuals, one of whom was entering the back seat of the automobile as the officer approached in his cruiser. There were no other persons in the area; no other discernible activity was occurring in that place at that time; and as the officer approached, he did not see any other vehicles leaving in any direction. On the basis of the facts as then known to him, his observations, and the reasonable inferences and deductions which he could make from the same, Officer Vondrasek could be said to have had a particularized and objective basis for suspecting that criminal activity was, had been, or was about to be engaged in by the three individuals he was then approaching, and therefore had the right to stop and detain them for a period of time sufficient to verify or dispel his suspicions. The defendant appears to complain about the appropriateness of the detention. The suspicion of the use of firearms in the early morning hours in a deserted area with no rational explanation certainly justifies the use of caution in the approach. One cannot say that the methods utilized for the stop and detention were inappropriate in this case.

Having therefore made a lawful "initial intrusion," Officer Vondrasek's subsequent discovery of the .22-caliber cylinder was inadvertent, it being in plain view on the rear floor of the automobile and easily discernible when looking into the same. Finally, there can be no doubt that upon discovery of the same, it became immediately apparent to Officer Vondrasek that this .22-caliber cylinder might be evidence of a crime. It therefore follows that a valid warrantless search occurred, and all relevant evidence discovered during that search was then admissible in the subsequent trial of the defendant.

Accordingly, there being no error on the part of the district court in overruling the defendant's motion to suppress, the decision is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDALL N. LEWCHUK, APPELLANT.

440 N.W.2d 229

Filed May 19, 1989. Nos. 88-777, 88-778.

1. **Motions for Continuance: Appeal and Error.** A continuance is a matter for the discretion of the trial court, whose ruling will be upheld absent an abuse of discretion.
2. **Sentences: Appeal and Error.** The issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether some other defendant received a lesser one.
3. **Sentences.** The mere fact that a defendant's sentence differs from one issued to a coperpetrator does not make the imposition of defendant's sentence an abuse of discretion.
4. _____. It is within the discretion of the district court to direct that sentences imposed for separate crimes be served consecutively.
5. _____. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the other offenses.
6. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Stanton County: MERRITT C. WARREN, Judge. Affirmed.

Scott D. Freese, of Hutton and Freese, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

These consolidated appeals arise from two criminal convictions. In case No. 88-777, defendant-appellant, Randall N. Lewchuk, pled guilty to a charge of burglary, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985), and was so adjudged and sentenced to imprisonment for a period of not less than 5 nor more than 10 years. In case No. 88-778, Lewchuk pled guilty to a charge of failing to appear, in violation of Neb. Rev. Stat. § 29-908 (Reissue 1985), and was so adjudged and

sentenced to imprisonment for a period of not less than 20 months nor more than 5 years, to be served consecutively to the sentence imposed for the burglary. The six errors Lewchuk assigns in his consolidated brief may be summarized as claiming that the district court (1) erroneously denied Lewchuk a continuance of the sentencing hearing and (2) imposed excessive sentences. In each case, we affirm.

After being charged with burglary on November 6, 1984, Lewchuk was arrested, and appeared for arraignment on January 28, 1985, without an attorney. The arraignment was continued to allow Lewchuk to consult an attorney, and Lewchuk was released on a $10,000, 10 percent bond.

Lewchuk failed to appear as he had been ordered, and, thus, a bench warrant for his arrest was issued and subsequently renewed, following which Lewchuk was eventually arrested. Arraignment on the burglary charge was rescheduled, and Lewchuk was again released from custody, this time on $7,500 cash bond, whereupon Lewchuk again failed to appear. Once more, arrest warrants were issued and renewed, and in the fullness of time Lewchuk was again arrested. This time, bond was set at $50,000 cash, and Lewchuk subsequently graced the county court with his presence for arraignment on June 16, 1988. At that time, Lewchuk, appearing pro se, requested and was granted a preliminary hearing on the 1984 burglary charge; on the date set for that hearing, Lewchuk, represented by counsel, elected to waive the proceeding he had requested earlier.

Case No. 88-778 was initiated on November 18, 1987, when Lewchuk was charged by information in the county court with failure to appear based on the first dereliction related above.

On July 13, 1988, Lewchuk, having been bound over to district court, pled as aforesaid pursuant to a plea bargain whereby the State dismissed a third charge arising out of Lewchuk's second failure to appear.

At the State's request, sentencing was postponed to August 19, 1988, so as to allow more time for completion of the presentence investigation and report. On August 16, Lewchuk requested a further continuance, for the reason that he was "facing charges in the United States District Court for the

District of Nebraska and has had an attorney appointed and wishes a continuance of this sentencing . . . until an expedited procedure is undertaken in the United States District Court." It was Lewchuk's position that, although no charges had yet been filed against him in federal court, he would shortly be called in that court to face charges of conspiracy to distribute cocaine, to which he intended to plead guilty, and that his subsequent federal sentence should be known before the court meted out sentence on the instant burglary and failure to appear charges. The district court concluded there was no reason the State should relinquish custody of Lewchuk and that it would be of no benefit to delay sentencing further, and the sentencing hearing was held as scheduled.

In connection with the first summarized assignment of error, it is to be noted that a continuance is a matter for the discretion of the trial court, whose ruling will be upheld absent an abuse of discretion. *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989). The district court did not abuse its discretion in concluding that no valid reason existed to continue a state sentencing proceeding because a federal charge might be filed and a federal sentence pronounced at a later time.

In connection with the second summarized assignment of error, Lewchuk argues that he should not have been sentenced so harshly for the burglary, when, according only to his own unsubstantiated statement at the sentencing hearing, his accomplice in that crime received a much lesser sentence. Assuming Lewchuk's representation to be true, his argument ignores the rule that the issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether some other defendant received a lesser one. *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989). The mere fact that a defendant's sentence differs from one issued to a coperpetrator does not make the imposition of defendant's sentence an abuse of discretion. *State v. Guida*, 230 Neb. 961, 434 N.W.2d 522 (1989).

Lewchuk also argues that the district court erred in ordering his sentences to run consecutively. It is within the discretion of the district court to direct that sentences imposed for separate crimes be served consecutively. *State v. Benzel*, 220 Neb. 466,

370 N.W.2d 501 (1985). As this court observed in *State v. Ellefson*, 214 Neb. 747, 753, 336 N.W.2d 88, 91-92 (1983), quoting *State v. Chapple*, 197 Neb. 4, 246 N.W.2d 714 (1976),

> " '[T]he test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses.' "

It was clearly within the district court's discretion to impose consecutive sentences upon Lewchuk for the separate offenses of burglary and failure to appear. As has oft been noted, in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Andersen, ante* p. 187, 440 N.W.2d 203 (1989); *State v. Fulton,* 231 Neb. 918, 438 N.W.2d 788 (1989); *State v. Lehl,* 231 Neb. 906, 438 N.W.2d 505 (1989).

Burglary is a Class III felony; failure to appear when one has been charged with a felony constitutes a Class IV felony. Under the provisions of Neb. Rev. Stat. § 28-105 (Reissue 1985), a Class III felony is punishable within a range of from 1 to 20 years' imprisonment, up to a $25,000 fine, or both; a Class IV felony is punishable within a range of from up to 5 years' imprisonment, up to a $10,000 fine, or both. Obviously, then, the sentences meted out to Lewchuk are well within the statutory ranges in both cases. Even ignoring Lewchuk's numerous encounters with the criminal law dating back over many years, it cannot be said the sentences evidence an abuse of discretion. Indeed, under the circumstances, anything other than substantial consecutive sentences would, as the district court cogently noted, depreciate the seriousness of the crime and promote disrespect for the law.

There being no merit to Lewchuk's summarized assignments of error, the judgment of the district court in each case is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. SIERKS, APPELLANT.

440 N.W.2d 231

Filed May 19, 1989. No. 88-783.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such questions are for the trier of fact, and a judgment must be affirmed if, taking the view of the evidence which is most favorable to the State, there is sufficient evidence to support it.
2. **Criminal Law: Intent: Proof.** Public indecency by exposing genitals of the body in public requires proof that the exposure was done with intent to affront or alarm any person.
3. **Intent: Proof: Evidence: Circumstantial Evidence.** Intent, like any mental process or other state of mind of a defendant, may be proved not only by direct but also by circumstantial evidence and the inferences drawn therefrom.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

James Michael Edgar, of Edgar & Wilson Law Offices, for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, David L. Sierks, was convicted of public indecency in violation of Neb. Rev. Stat. § 28-806(1) (Reissue 1985) and was fined $250 and costs. Upon appeal to the district court, the judgment was affirmed. The defendant has appealed to this court and contends the evidence was not sufficient to support the conviction.

The record shows that the defendant entered Casey's General Store in Hickman, Nebraska, at about 8:45 p.m. on November 11, 1987. According to the cashier who was on duty at that time, the defendant was wearing a navy-blue mechanic's uniform. The cashier testified that she "thought" the name printed on the defendant's shirt was "Dave." At this time, there were no other customers or employees in the store, and the cashier was in the

"back room," putting tapes away. Another employee was in the "pizza room" at the back of the store. The cashier returned to the front of the store and stood behind the counter by the cash register. At this time, the defendant was near the back of the store, at the milk cooler. As he began walking to the front of the store, the cashier saw that the defendant's pants were unzipped and his penis was exposed. According to the cashier, the defendant's penis was not erect but was "not completely placid." The cashier testified that she was shocked, and although the defendant did nothing to call attention to his exposed genitals, it was her feeling that the exposure was deliberate because if the defendant's zipper was broken, or his trousers had been unintentionally left unzipped, his genitals would "not hang out all the way like that." The defendant had not visited the restroom in the store, and when the defendant entered the store, his genitals were not exposed. After the defendant left the store, the cashier testified, she saw him drive away in a dark-green pickup, probably a Ford, with a license number of 2-15587. The cashier then reported the incident to the sheriff's office.

About 3 weeks later, while the cashier was on duty, she saw the defendant again in the store. At that time she told a coworker, "[T]hat's him." After the defendant left the store that time, she saw him drive away in a cream-colored Escort. She noted the license number and reported the matter to the sheriff's office.

Deputy Sheriff Kevin Pohlen testified that he made a followup investigation of the incident on November 29, 1987. Pohlen verified that the license numbers reported by the cashier were for vehicles owned by the defendant and his wife. Pohlen contacted the defendant at his home and informed him that he had been identified as the person responsible for exposing his genitals in the store on November 11, 1987. Pohlen testified that the defendant "was pretty much shocked" to find himself being investigated for public indecency. The defendant told Pohlen that he was unable to remember whether he had been at Casey's General Store on the evening of November 11. When asked if he was responsible for exposing himself to a store employee, he responded, "I could have done it, but I just don't

remember doing anything like that." The defendant admitted that he was employed by a service station and for his job wears industrial clothing—blue pants or a blue work shirt. The defendant also admitted that he owned a beige Ford Escort and a blue Ford pickup.

At the trial, the defendant testified that he was at home the evening of November 11 and did not leave the house. His testimony was corroborated by that of his wife.

The evidence was in conflict and presented questions of fact for the trial court. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such questions are for the trier of fact, and a judgment must be affirmed if, taking the view of the evidence which is most favorable to the State, there is sufficient evidence to support it. *State v. Lesac*, 231 Neb. 718, 437 N.W.2d 517 (1989).

Public indecency by exposing genitals of the body in public requires proof that the exposure was done with intent to affront or alarm any person. § 28-806.

Although the defendant contended at trial that he was not at Casey's General Store on the evening of November 11, 1987, his principal contention in this court is that the State failed to prove beyond a reasonable doubt that he exposed himself to the victim with intent to affront or alarm. Intent, like any mental process or other state of mind of a defendant, may be proved not only by direct but also by circumstantial evidence and the inferences drawn therefrom. *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988). The evidence of the State was such that, if believed, it was sufficient to permit the trial court to find that the defendant possessed the requisite intent.

The question in this case is somewhat similar to that in *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987), where the State was required to prove that the defendant's sexual contact with the victim had been for the purpose of sexual arousal or gratification of either party. Neb. Rev. Stat. §§ 28-320 and 28-318(5) (Reissue 1985). The defendant claimed that the

evidence failed to show that his conduct in touching the victim could be "reasonably construed as being for the purpose of sexual arousal or gratification" as required by the statute. We held that "[t]he statute does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose." *Id.* at 873, 415 N.W.2d at 475-76.

In this case the evidence is that the victim saw the defendant walk from the rear of Casey's General Store to the front of the store, with the zipper of his pants unzipped and his penis exposed. The circumstances were such that the trial court could find that the exposure was not accidental, but was deliberate, and was done with the intent to affront or alarm the victim.

The judgment is affirmed.

AFFIRMED.

CHRISTINE A. DILSAVER, APPELLANT, V. JOHN E. DILSAVER, APPELLEE.

439 N.W.2d 796

Filed May 19, 1989. No. 88-858.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Anthony S. Troia for appellant.

Steven J. Lustgarten and Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

PER CURIAM.

The sole issue on appeal in this dissolution of marriage action is the custody of the two minor children of the parties. After finding that both parties were fit and proper parents, the trial court granted custody of the children, ages 3 1/2 and 1 1/2 at the

time of trial in September 1988, to the appellee father, subject to visitation in the appellant mother.

We have held that determinations as to the custody of and visitation with minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Shaffer v. Shaffer,* 231 Neb. 910, 438 N.W.2d 507 (1989); *Griffith v. Griffith,* 230 Neb. 314, 431 N.W.2d 609 (1988); *Staman v. Staman,* 225 Neb. 864, 408 N.W.2d 320 (1987).

We have so reviewed this case. We determine that the trial judge did not abuse his discretion. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WESLEY EARL KITT, APPELLANT.

440 N.W.2d 234

Filed May 19, 1989. No. 88-863.

1. **Speedy Trial: Pleas: Waiver.** A defendant who fails to move for discharge before entry of a plea of guilty or no contest waives the statutory right to a trial within 6 months, which is provided by Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985).
2. **Pleas.** A plea of nolo contendere is equivalent to a plea of guilty for convicting and sentencing a defendant.
3. **Pleas: Waiver: Indictments and Informations.** A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the information or complaint is insufficient to charge a criminal offense.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.
5. **Sentences.** Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time.

6. **Sentences: Words and Phrases.** "Jail time" is commonly understood to be the time the accused spends in detention pending trial and sentencing.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

By its five-count information filed on November 9, 1987, in the district court for Lancaster County, the State charged Wesley Earl Kitt with attempts to obtain possession of a controlled substance through a forged prescription, see Neb. Rev. Stat. § 28-418(1)(c) (Reissue 1985), which is a Class IV felony, see § 28-418(2). On November 10, Kitt filed a plea in abatement, challenging the sufficiency of evidence adduced at his preliminary hearing. Sometime before January 7, 1988, Kitt was transferred to Douglas County to await trial in that county on the charge of theft by unlawfully taking property valued in excess of $1,000, a Class III felony. See Neb. Rev. Stat. §§ 28-511 and 28-518(1) (Reissue 1985). On January 7, 1988, the district court for Lancaster County overruled Kitt's plea in abatement. After Kitt's conviction in Douglas County for the theft charge, he was sentenced in Douglas County on February 23 to imprisonment for not less than 5 nor more than 15 years.

On March 23, Kitt was transferred from Douglas County to Lancaster County for arraignment on the pending controlled substances charges. After pleading not guilty in Lancaster County, on July 18 Kitt filed a motion to suppress evidence. Although a hearing on the suppression motion had been scheduled for August 22, in accordance with a plea arrangement Kitt withdrew his not guilty pleas on August 22 and immediately entered his no contest pleas to an amended information charging him with two counts of attempted possession of a controlled substance, in violation of Neb. Rev.

Stat. §§ 28-201 and 28-416(3) (Reissue 1985), a Class I misdemeanor punishable by 1 year's imprisonment, a $1,000 fine, or both such imprisonment and fine. See Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 1986) and 28-201(4)(d) (Reissue 1985). Concerning Kitt's no contest pleas, the court informed and admonished Kitt in accordance with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and Kitt voluntarily, knowingly, and intelligently waived the rights specified in *Irish*. As recounted in the factual basis presented to the court for acceptance of Kitt's no contest pleas, the signature of the ordering physician on the prescriptions, that is, the signature of a "Dr. M.J. Swartz," was in Kitt's handwriting. The prescriptions ordered "Talwin NX," which contains pentazocine, a Schedule IV controlled substance.

The presentence report on Kitt contains six pages reflecting Kitt's criminal record, which included convictions for forgery, burglary, and theft. On September 28, 1988, the court sentenced Kitt on each conviction under the amended information, namely, imprisonment for 4 months to 1 year with credit for 173 custodial days in Douglas and Lancaster Counties. The sentences imposed in Lancaster County were "to be served consecutively to each other and to any other sentence . . . ." The district court for Lancaster County did not give Kitt credit for time served in imprisonment for the conviction in Douglas County. Authorities in Douglas County requested Kitt's return to Douglas County at the conclusion of the proceedings against Kitt in Lancaster County.

SPEEDY TRIAL

Kitt contends that his convictions violate his statutory right to a speedy trial prescribed by Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). In pertinent part, § 29-1207 provides:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed.

Section 29-1208 provides: "If a defendant is not brought to trial before the running of the time for trial, as extended by

excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense." Section 29-1209 provides: "Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial."

A defendant who fails to move for discharge before entry of a plea of guilty or no contest waives the statutory right to a trial within 6 months, which is provided by §§ 29-1207 to 29-1209. *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974). See *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). See, also, *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984). Since Kitt failed to move for discharge before the court accepted Kitt's no contest pleas, he waived his statutory right to a trial within 6 months from the filing of the information against him.

Moreover, Kitt entered his valid no contest pleas to the amended information and charges against him. A plea of nolo contendere is equivalent to a plea of guilty for convicting and sentencing a defendant. *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983). A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the information or complaint is insufficient to charge a criminal offense. *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986); *State v. Blankenbaker*, 197 Neb. 344, 248 N.W.2d 773 (1977).

EXCESSIVE SENTENCE

A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed. *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

Although each sentence imposed on Kitt for the controlled substance convictions is the maximum for a Class I misdemeanor, the presentence report on Kitt shows numerous prior offenses which were undoubtedly taken into consideration by the sentencing court. " 'It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively as opposed to concurrently.' " *State v. Irish, supra* at 817, 394 N.W.2d at 881.

See, also, *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). Kitt argues that he should have been given credit for the custodial time from February 23, 1988 (sentence in Douglas County) to September 28, 1988 (sentence in Lancaster County). "[W]here the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time." *State v. Vrtiska, supra* at 608-09, 418 N.W.2d at 764. "Jail time" is commonly understood to be the time the accused spends in detention pending trial and sentencing. *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984). However, Kitt's custodial time in Douglas County was actually imprisonment on account of the conviction of theft and was time being served on Kitt's conviction in Douglas County. Because the period from February 23 to September 28, 1988, was actually time being served on the Douglas County sentence, Kitt was not entitled to credit on the Lancaster County sentence for the time being served on the Douglas County sentence. We find no abuse of discretion in the sentences imposed by the district court for Lancaster County.

CONCLUSION

Kitt waived his statutory right to speedy trial, and the sentences imposed on Kitt are not excessive. Therefore, the judgment of the district court is affirmed in all respects.

AFFIRMED.

FAHRNBRUCH, J., not participating.

L.J. VONTZ CONSTRUCTION CO., INC., APPELLANT, V. DEPARTMENT OF ROADS, STATE OF NEBRASKA, APPELLEE.

440 N.W.2d 664

Filed May 19, 1989. No. 88-925.

Administrative Law: Limitations of Actions: Motions to Dismiss: Claims. The State may raise the bar of the statute of limitations by a motion to dismiss filed with the administrative agency charged with determining the State's liability for payment on a contract claim.

Appeal from the District Court for Lancaster County: JEFFRE P. CHEUVRONT, Judge. Affirmed.

Jeff C. Miller, of Young & White, for appellant.

Robert M. Spire, Attorney General, and John E. Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

L.J. Vontz Construction Co., Inc. (Vontz), appeals from the judgment of the district court for Lancaster County, which affirmed the order of the Department of Administrative Services (DAS), dismissing Vontz' contract claim barred by the statute of limitations.

FACTS

On September 27, 1983, Vontz and the Department of Roads (DOR) of the State of Nebraska entered a written contract whereby Vontz was the contractor on construction Project No. OM-AD-36(9) Div. II in Cheyenne County, Nebraska. Vontz commenced work on the project on May 9, 1984. In a letter dated July 23, 1984, DOR declared Vontz in default under the contract and ordered Vontz to remove its personnel and equipment from the project sites. In April of 1985, DOR made its last payment to Vontz for its work done before ouster of Vontz from the construction sites.

On February 3, 1987, Vontz filed its claim with DAS and alleged that DOR had breached the construction contract with Vontz. See Neb. Rev. Stat. § 77-2406 (Reissue 1986) (DAS examination of contract claims against the state). All the conduct of DOR alleged as a basis for the Vontz claim occurred on or before July 23, 1984. DOR filed a motion to dismiss Vontz' claim, asserting that the claim was barred by the statute of limitations contained in Neb. Rev. Stat. § 25-218 (Reissue 1985), which in pertinent part provides: "Every claim and demand against the state shall be forever barred, unless the action be brought thereon within two years after the claim arose." In response to the DOR motion, Vontz contended that its contract claim or cause of action did not accrue until DOR

made its final payment in April 1985.

DAS found that Vontz' right to claim a breach of the construction contract accrued on July 23, 1984, when DOR declared Vontz in default and prevented further performance of the contract. Because Vontz did not file its claim with DAS until February 3, 1987, DAS found the claim was barred by § 25-218 and, pursuant to DOR's motion, denied Vontz' claim.

Vontz appealed to the district court. See Neb. Rev. Stat. § 77-2407 (Reissue 1986) (appeal to the district court in the manner provided by Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1987) of the Administrative Procedure Act). The district court affirmed DAS' denial of the Vontz claim.

The issue, one of first impression before this court, is whether an administrative agency, charged with examining and approving contract claims for payment by the state, is empowered to dismiss a claim which is barred by the statute of limitations.

We realize that, during the pendency of Vontz' appeal, the Legislature repealed § 77-2407 and enacted the State Miscellaneous Claims Act, Neb. Rev. Stat. §§ 81-8,294 to 81-8,301 (Cum. Supp. 1988), and the State Contract Claims Act, Neb. Rev. Stat. §§ 81-8,302 to 81-8,306 (Cum. Supp. 1988). The State Miscellaneous Claims Act and the State Contract Claims Act altered the procedure for payment of a claim against the state which existed when Vontz filed its claim, and now provide for possible original judicial determination of contract claims against the state. However, the procedures under the claims acts, enacted after the disposition of Vontz' claim, are irrelevant to Vontz' appeal.

LIMITATION OF ACTIONS

"Statutes of limitations have an important role in disposition of claims between individuals, because such statutes promote and produce finality and thereby stability in human affairs. In this manner statutes of limitations stimulate activity and punish unreasonable delay in prosecuting claims." *Rosnick v. Marks*, 218 Neb. 499, 501, 357 N.W.2d 186, 188 (1984).

Our law is clear regarding the operation of a statute of limitations in a civil action. "If a petition alleges a cause of action ostensively barred by the statute of limitations, such

petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute." *Rosnick, supra* at 501-02, 357 N.W.2d at 188; *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). When it is apparent from the face of the petition that the action is barred by a statute of limitations, the petition fails to state a cause of action and is subject to a general demurrer. *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954). See Neb. Rev. Stat. §§ 25-806 and 25-807 (Reissue 1985). When it is not apparent from the face of the petition that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer. *Vielehr, supra*. Since a defendant cannot raise the statute of limitations for the first time on appeal, a defendant waives the statute of limitations by failure to raise the issue in a demurrer or the defendant's answer. *Vielehr, supra*.

The foregoing observations concerning a petition in a civil action are analogously applicable to a contract claim against the state, that is, a claimant's contract demand for money from the state.

We also recognize that Nebraska civil procedure does not authorize a pretrial motion to dismiss, or, as expressed in *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 256, 383 N.W.2d 36, 40 (1986): "A pretrial motion to dismiss is not permissible as a pretrial pleading but may sometimes be recognized as a demurrer on stipulation of the parties or by rule of court."

Although we have noted general rules of procedure pertaining to the statute of limitations in pleadings applicable to civil actions, we realize that the rules which we have mentioned are part of a procedure which is inapplicable to actions before an administrative agency. Thus, we are confronted by the contract claims act under which Vontz filed its claim, a legislative provision which contains no procedural mechanism for raising the statute of limitations as an issue concerning a contract claim against the state. Without a means to raise the statute of limitations at the level of the administrative hearing before DAS, the State (DOR) could not raise the statute of limitations for the first time on appeal to the district court. See *Vielehr v. Malone, supra*. In such a peculiar situation, the State

is without a means to raise the statute of limitations at an administrative hearing, whereas, were the claim initially prosecuted in a civil action, the State could raise the statute of limitations through a demurrer or in its answer. *Vielehr v. Malone, supra.* Consequently, DOR finds itself in a procedural predicament, unable to raise the statute of limitations concerning a claim barred by the statute. To require a hearing at the administrative level, perhaps involving tons of testimony and seemingly endless exhibits regarding a contract claim, when a claim on its face demonstrates that the statute of limitations bars recovery, is an exercise imbued with immense impracticability and inevitability of an impossible recovery as the result of the statute of limitations. Thus, we hold that the State may raise the bar of the statute of limitations by a motion to dismiss filed with the administrative agency charged with determining the State's liability for payment on the contract claim.

Our holding regarding the availability of a motion to dismiss, filed with an administrative agency and based on the statute of limitations, does not affect the procedural rule expressed in *Voyles v. DeBrown Leasing, Inc., supra*, and similar cases, such as *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983), and *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984), namely, a motion to dismiss is not a permissible pleading under the statutes prescribing the procedure applicable to civil actions in Nebraska. As we have previously mentioned in this opinion, proceedings before an administrative agency, such as DAS, are not governed by Nebraska statutes otherwise controlling procedure in civil actions.

Vontz' claim arose out of DOR's actions before July 23, 1984, conduct which culminated in DOR's ouster of Vontz from the construction project on July 23. Vontz does not allege any occurrence or circumstance which would toll the statute of limitations, and never requested amendment of its claim. Because Vontz' claim is facially barred by the statute of limitations, and because Vontz has not included allegations which would toll the statute of limitations, Vontz' claim was subject to DOR's motion to dismiss based on the statute of limitations.

Notwithstanding Vontz' contention that DOR issued a final payment in April 1985 concerning the construction work pursuant to the contract, the breach, if any, occurred when Vontz was ousted from the project sites. The final payment alleged by Vontz merely affected the amount of Vontz' damages. However, as we stated in *Rosnick v. Marks*, 218 Neb. 499, 503, 357 N.W.2d 186, 189 (1984), "A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, although the nature and extent of damages may not be known." Consequently, the date on which the final payment was made is relevant only to the amount of damages sustained and is irrelevant to application of the statute of limitations as a bar to Vontz' claim. The cause of action for a breach of contract accrues, and the statute of limitations begins to run, when the breach occurs. See *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979) (a party to a contract has the right to institute a breach of contract action when a breach of the contract occurs). See, also, *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 331 N.W.2d 320 (1983). Thus, Vontz' contract claim or cause of action accrued when the alleged breach occurred on July 23, 1984, namely, DOR's ouster of Vontz from the construction project.

CONCLUSION

Vontz' claim unequivocally demonstrated that the statute of limitations barred any recovery from the State of Nebraska; hence, DOR's motion to dismiss was properly sustained by DAS. Since Vontz has failed to timely file a claim, we need not consider Vontz' assignments of error directed to the scope of a district court's review in an appeal from DAS.

The judgment of the district court, affirming DAS' dismissal of Vontz' claim, is affirmed.

AFFIRMED.

BETTY MURRELL, APPELLEE, V. CHARLES MURRELL, APPELLANT.

440 N.W.2d 237

Filed May 19, 1989. No. 88-944.

1. **Alimony: Modification of Decree.** Unless amounts have accrued prior to the date of service of process on a petition to modify a dissolution of marriage decree, orders for alimony may be modified or revoked for good cause shown.
2. **Alimony: Appeal and Error.** The granting of alimony is a matter initially entrusted to the discretion of the trial judge; on appeal, such matters are reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
3. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1988) make it appropriate.
4. **Property Division: Alimony.** A division of property and the awarding of alimony are not subject to a precise mathematical formula; rather, an appropriate division of marital property and amount of alimony must turn on reasonableness and the circumstances of each particular case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1988).
5. **Alimony: Words and Phrases.** Alimony is an allowance for support and maintenance and is a substitute for marital support.
6. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
7. _____. In setting the amount of alimony, the trial court should consider what effect, if any, the marriage has had upon the ability of the supported spouse, if any, to secure employment in the future, and the earning capacity of the supporting spouse.
8. _____. Alimony is not to be used simply to equalize the income of the parties or to punish one of the parties; it may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment.
9. **Attorney Fees.** Attorney fees are recoverable in Nebraska only where provided by statute or allowed by custom.
10. **Divorce: Attorney Fees.** It is the custom to award attorney fees in appropriate circumstances in dissolution of marriage cases.
11. _____: _____. An award of attorney fees in a dissolution of marriage action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed as modified.

G. Randolph Reed and Benjamin P. King, of Reed Law Office, for appellant.

Paul W. Snyder, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

In this dissolution of marriage case, the respondent-appellant husband, Charles Murrell, challenges the award of alimony to the petitioner-appellee wife, Betty Murrell, by asserting the district court erred (1) in purporting to make the award not subject to modification and (2) by ordering excessive payments. We affirm as modified.

The parties were married in 1962. At the time of trial the wife was 43 years of age and the husband 53. Four children were born of the marriage, all of whom had attained the age of majority by the time of trial.

The wife has a ninth-grade education; the husband progressed through the eighth grade. The wife, who had been employed at the time of, and periodically during, the marriage, was employed at the time of trial, working fewer than 40 hours per week and earning $3.85 per hour. The wife's most recent paycheck stub, admitted into evidence, indicates that in the 1988 calendar year, she had earned a gross amount, before taxes and deductions, of $4,381.65 through September 1, 1988, suggesting that her total earnings, before taxes and deductions, would have amounted to approximately $6,572.48 in 1988.

The wife's highest wage during the marriage had been $3.90 per hour, the 5-cent-per-hour increment having been based on "certification" for her position as some type of health care provider, which certification required periodic retesting. She testified that she could not afford to pay for this testing and so had allowed her certification to lapse. Moreover, she was medically precluded from doing heavy lifting at the time of trial.

At the time of trial the husband was employed at Western Sugar as a sugar boiler, earning $12.44 per hour for a 40-hour

workweek, with 8 hours of overtime scheduled every 3 weeks. His 1987 income tax return reveals that his total income in the year preceding trial was $28,412. Having no adjustments to income, his adjusted gross income equaled his total income.

The couple had accumulated certain assets during their 26-year marriage which the district court distributed in such a manner that the wife received somewhat more than $15,337 in net asset value and the husband $12,760.06. The decree also provides:

> [The husband] shall pay as alimony to the [wife] the sum of $350.00 per month for a period of 121 months, commencing November 1, 1988 and the 1st of each month thereafter. Such alimony shall not be modifiable and shall terminate upon the death or remarriage of the [wife]. Delinquent payments shall draw interest at the legal rate per annum until paid.

In considering the modifiability of the district court's alimony award, we note that Neb. Rev. Stat. § 42-365 (Reissue 1988) provides in relevant part that "[u]nless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown . . . ."

In *Ball v. Ball*, 183 Neb. 216, 159 N.W.2d 297 (1968), a case predating the adoption of § 42-365, this court outlined the distinction between "alimony" and "alimony in gross" as follows, and adopted the following rule:

> The distinction between "alimony" and "alimony in gross" may be gathered from the accepted definitions of the two terms. " 'Alimony,' which signifies literally nourishment or sustenance, is an allowance for support and maintenance, or, as has been said, a substitute for marital support. It is the allowance which a husband may be compelled to pay to his wife or former wife for her maintenance when she is living apart from him or has been divorced." . . . "Alimony in gross, or 'lump-sum alimony,' is fundamentally the award of a definite sum of money; and if the sum is payable in instalments the payments run for a definite length of time. The sum is payable in full, regardless of future events such as the death of the

> husband or the remarriage of the wife. Gross alimony becomes a vested right from the date of the rendition of the judgment, and the manner of its payment in no wise affects its nature or effect. The fact that the award is payable in instalments is not determinative of the question whether it is gross alimony or periodic alimony. On the other hand, alimony in general, or instalment alimony, contemplates periodic payments of a definite sum for the indefinite future, and terminates on the death of either party or the remarriage of the wife." . . . The phrase "alimony in gross" or "gross alimony" is always for a definite amount of money, the payment is always for a definite length of time, and it is always a charge on the estate of the husband and is not modifiable. It, therefore, appears that a decree providing for "alimony in gross," constituting a final judgment not subject to modification, must incorporate each and every one of the following propositions to meet the recognized requirements for this type of judgment, to wit: (1) The award must be for a definite sum or for installments payable over a definite period of time; (2) it must be payable in full regardless of the death or remarriage of the judgment creditor; and (3) it cannot terminate on the death of the judgment debtor.

(Citations omitted.) *Id.* at 219-20, 159 N.W.2d at 300. We observe that the instant award satisfies only the first element of the *Ball* definition of alimony in gross.

More recently, in *Van Pelt v. Van Pelt*, 206 Neb. 350, 354, 292 N.W.2d 917, 919-20 (1980), decided after the enactment of § 42-365,

> [t]he decree . . . required the husband to pay to the wife as alimony the sum of $100 per month for a period of 121 months. The decree recited that the alimony granted was to be deemed alimony in gross and was not to be affected or terminated by the marriage or death of either party. The alimony did not bear interest except for delinquent payments.

We reasoned:

> Under a prior statute, this court held that an unqualified allowance of alimony in gross, whether

> payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. . . . Under the terms of Neb. Rev. Stat. §§ 42-365 and 42-366 (Reissue 1978), we believe that rule must be extended to those cases in which the decree expressly precludes modification. The terms of the decree in the present case expressly designate the alimony judgment as alimony in gross and expressly preclude modification.

(Citations omitted.) *Id.* at 355, 292 N.W.2d at 920. This court affirmed the district court's award of alimony. Unlike the award in *Van Pelt*, the instant award is not expressly designated "alimony in gross."

Alimony and distribution of property rights have different purposes in marriage dissolution proceedings, but in a proper case they may be considered together in reaching an award that is just and equitable. *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984). Alimony in gross is, in fact and effect, a structured property distribution rather than an award of support and maintenance.

In the instant case, the parties shared approximately equally in the distribution of property ordered by the district court. It would appear that the subject alimony award may not fairly be viewed as a distribution of property, for to do so would constitute the district court's property distribution abusive of its discretion. It is clear, therefore, that the subject award is one of alimony, not of alimony in gross.

" 'Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown . . . .' " *Creager v. Creager*, 219 Neb. 760, 761, 366 N.W.2d 414, 416 (1985), quoting § 42-365. Thus, the language of the district court purporting to render the alimony award in the instant case not subject to later modification is null, void, and of no effect.

Turning next to the question of the award itself, we first remind ourselves that the granting of alimony is a matter

initially entrusted to the discretion of the trial judge. On appeal, such matters are reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Lager v. Lager, ante* p. 150, 440 N.W.2d 193 (1989); *Dabbs v. Dabbs,* 230 Neb. 368, 431 N.W.2d 640 (1988); *Ritz v. Ritz,* 229 Neb. 859, 429 N.W.2d 707 (1988).

The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in § 42-365 make it appropriate. *Ritz v. Ritz, supra.* Section 42-365 provides in relevant part as follows:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

A division of property and the awarding of alimony are not subject to a precise mathematical formula. Rather, an appropriate division of marital property and amount of alimony must turn on reasonableness and the circumstances of each particular case in light of the factors set forth in § 42-365. *Keim v. Keim,* 228 Neb. 684, 424 N.W.2d 112 (1988).

Alimony is an allowance for support and maintenance and is a substitute for marital support. *Buche v. Buche,* 228 Neb. 624, 423 N.W.2d 488 (1988). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Buche v. Buche, supra.* The trial court should consider what effect, if any, the marriage has had upon the ability of the supported spouse, if any, to secure employment in the future, and the earning capacity of the supporting spouse. *Kimbrough v. Kimbrough,* 228 Neb. 358, 422 N.W.2d 556 (1988).

Alimony is not to be used simply to equalize the income of

the parties or to punish one of the parties. It may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment. *Kimbrough v. Kimbrough, supra.*

With but a ninth-grade education to build upon, it is not unreasonable to infer that the wife will need to invest quite some time in the development of skills suiting her to employment at a significantly increased level. Under the circumstances as they presently exist, we cannot say that either the amount of alimony awarded or the duration thereof is so unreasonable as to constitute an abuse of discretion.

Finally, we consider the wife's request for attorney fees in this court. Attorney fees are recoverable in Nebraska only where provided by statute or allowed by custom. *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989). It is the custom to award attorney fees in appropriate circumstances in divorce cases. See, e.g., *Thiel v. Thiel*, 230 Neb. 806, 433 N.W.2d 539 (1989); *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988); *Keim v. Keim, supra*; *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987). An award of attorney fees in a dissolution of marriage action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Hamm v. Hamm, supra.* Giving due consideration to these factors, we determine that each party shall pay her and his own attorney fees for services in this court.

The decree of the district court is affirmed as modified in accord with this opinion.

AFFIRMED AS MODIFIED.

FIRST NATIONAL BANK IN MITCHELL, A NATIONAL BANKING CORPORATION, APPELLANT, V. PATRICIA A. KURTZ, ARTHUR GILBERT KURTZ, AND CYNTHIA ANN BROWN, COPERSONAL REPRESENTATIVES OF THE ESTATE OF ARTHUR H. KURTZ, DECEASED, ET AL., APPELLEES.

440 N.W.2d 432

Filed May 26, 1989. No. 87-196.

1. **Directed Verdict: Appeal and Error.** A party against whom a motion for directed verdict has been granted is entitled, on appeal, to have all factual issues, together with legitimate inferences and conclusions, resolved in its favor.
2. **Trial: Evidence: Appeal and Error.** A trial judge has discretion to determine whether testimony or evidence is inconsistent with prior testimony, and, absent an abuse of that discretion, a ruling that it is improper impeachment will be upheld on appeal.
3. **Contracts.** The court makes the initial decision whether a contract is ambiguous, that is, reasonably susceptible to more than one meaning. Once it is determined an ambiguity exists, interpretation of the ambiguity becomes a question of fact.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

John A. Selzer, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

James R. Hancock, of Hancock & Denton, P.C., for appellees Arthur Kurtz and Brown.

Dennis M. Coll for appellee Patricia Kurtz.

Robert M. Harris, of Harris & Lippstreu, for appellee Burkman.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

REAGAN, D.J.

This is an action for conversion of property brought by appellant, First National Bank in Mitchell (Bank), against the appellees. From an order granting the appellees' motion for a directed verdict at the close of appellant's evidence and a subsequent order denying a motion for new trial, the Bank has brought this appeal.

Under the posture of the case, the Bank is entitled to have all factual issues, together with legitimate inferences and conclusions, resolved in its favor. *Henderson v. Forman*, 231 Neb. 440, 436 N.W.2d 526 (1989); *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). With that rule in mind, we now set forth the factual background disclosed by the record.

For a number of years prior to 1983, Jerry and Laurie Kurtz borrowed money from the Bank to finance their farming operation. They farmed land in "Sections 5/22/56 and 14/22/56," which was commonly referred to as the Hettinger property. Jerry's father, Arthur Gilbert Kurtz, farmed land owned by Jerry's grandfather, Arthur H. Kurtz. In the fall of 1983, to secure existing indebtedness to the Bank of approximately $300,000, Jerry and Laurie Kurtz signed and delivered to the Bank a security agreement. The agreement granted a security interest in all owned or later acquired "farm products or inventory, including but not limited to all livestock, crops, grain, hay, seed, feed, fertilizer, supplies, and products of crops and of livestock . . . ."

The agreement further provided in printed language: "The above described crops are growing or will be grown on the following described real estate." And in typewritten language: "Sections 5/22/56 and 14/22/56 in Scotts Bluff County, NE."

The property which is the subject matter of this action is livestock feed from crops grown on land other than as described in the above document.

Although not relevant to the disposition of this case, at approximately the same time, the Bank took written guaranties from Jerry's parents for $15,000 and from Laurie's parents for $35,000. The consideration for the guaranties was a matter of dispute, the Kurtzes claiming it was to allow the Bank to consider further loans to support the 1984 farming operation, and the Bank contending it was to allow Jerry the continued use of his farm machinery, which was then subject to repossession under a prior security agreement.

In late fall of 1983, Jerry's father decided to retire from farming. Jerry and his grandfather, Arthur H. Kurtz, then

entered into an agreement where Jerry would farm his grandfather's property in 1984. The terms of the agreement were outlined by Jerry's testimony as follows: Jerry would farm the property and make efforts to finance his operation by borrowing the money; if he was able to borrow the money, which he felt he would be able to do, he would pay his grandfather cash rent of $115 per acre for 185 acres of land; if the efforts at financing were unsuccessful, he was to keep track of all of his expenses, and his grandfather would pay him for his work on a "custom farming" basis. The agreement was incomplete in that there were no terms reached with respect to the amount of payment for work as a custom farmer or the expenses that he was to be reimbursed for in the event his efforts at financing were unsuccessful.

Jerry testified as to his efforts to finance the 1984 farming operation, which commenced as early as the spring of 1983 and continued until April of 1985. The efforts were unsuccessful. As the 1984 farm year developed, Jerry's grandfather advanced the money necessary to purchase seed and fertilizer. The crops grown by Jerry on his grandfather's land, when harvested for feed, produced 456 tons of earlage, 2,325 tons of silage, and 322 tons of haylage. Jerry's grandfather died on January 2, 1985, and at the time of his death, all of this feed was located on his farm.

In January of 1985, while they were still attempting to obtain financing for the 1984 crop season, Jerry and Laurie Kurtz executed and delivered to Jerry's mother, Patricia Kurtz, a bill of sale covering the feed that had been raised on his grandfather's land. The evidence is undisputed that the purpose of executing and delivering this bill of sale was an effort to secure the liability on the part of Jerry's mother for the guaranty signed in May of 1983. Following the execution and delivery of the bill of sale from Jerry and Laurie to Patricia Kurtz, the estate of Arthur H. Kurtz made a demand upon Jerry for the cash rent pursuant to the agreement with his grandfather. The initial inventory filed by the estate also claimed this cash rent as an asset.

In April of 1985, after Jerry's efforts at financing were unsuccessful, arrangements were made by the personal

representatives of the estate of Arthur H. Kurtz to sell all of this feed to Dick Burkman. The sale was consummated, and delivery took place in the summer of 1985. The estate received the sum of $41,499.10, and $49,932.26 was paid to Patricia Kurtz. Testimony established that this division of the sale price was a compromise of reciprocal claims between the estate and Jerry Kurtz—the estate's claim for cash rent and Jerry's claim for custom farming his grandfather's land. The amount received by the estate was exactly the total of the amount advanced by Jerry's grandfather for seed and fertilizer, the amount advanced by the estate for delivery expenses, and the amount the grandfather would have received for cash rent had Jerry obtained financing.

In October of 1985, Jerry and Laurie filed for bankruptcy. Upon receipt of a copy of the bankruptcy petition, the Bank was made aware that Jerry and Laurie had transferred their interest in the feed to Patricia Kurtz by bill of sale in January 1985. Demand was made upon Patricia Kurtz for the return of the feed on January 16, a replevin hearing was subsequently filed, and on February 28, demand was made upon Dick Burkman for the return of the feed. Upon learning the demand could not be honored, this action for conversion was filed.

The Bank assigns as errors the (1) sustaining of the motions for directed verdict; (2) determination that there was insufficient evidence for the jury to find that Jerry Kurtz owned the feed and that the Bank had a security interest in it; (3) refusal to admit into evidence a bankruptcy petition and schedule filed by Jerry and Laurie Kurtz; (4) refusal to admit into evidence a copy of a proposed settlement agreement between Jerry Kurtz and the estate of Arthur H. Kurtz; and (5) admission into evidence of the amended inventory for the estate of Arthur H. Kurtz.

We treat these assignments of error in reverse order. In the Bank's case, as before mentioned, the estate inventory was introduced in evidence (but only as an admission against the estate of Arthur H. Kurtz), showing cash rent due for 1984 from Jerry Kurtz as an asset of the estate. On cross-examination of one of the copersonal representatives, an amended inventory was marked and received in evidence over

the Bank's objection. It showed the subject feed as an asset of the estate and a contingent liability to Jerry Kurtz for custom farming during 1984. The amended inventory is admissible under Neb. Evid. R. 106, which provides in part as follows:

> (1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. . . . When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

Neb. Rev. Stat. § 27-106 (Reissue 1985). We recognize the amended inventory was completed and filed subsequent to the institution of this lawsuit, but that affects only its probative value, not its admissibility.

The Bank contends in its fourth assignment of error that the trial court erred by refusing to admit into evidence a copy of a proposed settlement agreement between Jerry Kurtz and the estate of Arthur H. Kurtz prepared in April of 1985. The proposed settlement agreement related to the claim of Jerry Kurtz for the value of his services as a custom farmer. The exhibit was first offered generally and, later in the trial, offered specifically for the limited purpose of impeaching testimony of Jerry Kurtz. The general offer was refused by the trial judge for the reason it was evidence of an offer to compromise a claim. Neb. Rev. Stat. § 27-408 (Reissue 1985). When refusing the limited offer, the trial judge indicated that the exhibit was surplusage of a previous exhibit, which had been offered and received. Evidence, although relevant, may be excluded if it is cumulative. Neb. Rev. Stat. § 27-403 (Reissue 1985). We have also stated, and adhere to, the rule that an abuse of discretion must be shown to sustain an assignment of error directed at the exclusion or admission of evidence. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989); *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987). The rulings of the trial court are correct and fail to show any abuse of discretion, and the assignment of error fails.

The third assignment of error deals with the trial court's refusal to admit into evidence a bankruptcy petition and

schedule filed by Jerry and Laurie Kurtz in October of 1985. The court ruled that the bankruptcy petition was hearsay and refused to receive it into evidence. Jerry and Laurie Kurtz were not parties to this action, and the court's ruling that the matter was hearsay is correct. Neb. Rev. Stat. § 27-801 (Reissue 1985). Following this offer, Jerry Kurtz further testified that he made no claim to be the owner of the feed in question beyond the spring of 1985. The bankruptcy petition and schedule were then reoffered to impeach his testimony. The schedule recites that Jerry and Laurie had transferred *an interest in the feed* to Patricia Kurtz by a bill of sale in January of 1985. Jerry had testified he transferred his interest in the feed by this bill of sale. In determining whether subsequent evidence or testimony constitutes impeachment, a trial judge has the discretion to determine whether the testimony is inconsistent, and, absent an abuse of that discretion, the ruling will be upheld on appeal. See, *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985); *Krantz v. Marge's Mufflers, Inc.*, 184 Neb. 838, 172 N.W.2d 624 (1969). The bankruptcy schedule dealt with transfer of interests rather than a claim of ownership, and the ruling of the trial court that it did not impeach the prior testimony is neither incorrect nor does it constitute an abuse of discretion.

We treat assignments of error (1) and (2) together. It is incumbent upon the plaintiff, in an action for conversion, to establish a general or special ownership in certain property. 89 C.J.S. *Trover & Conversion* §§ 1 et seq. (1955). The Bank established a security interest in the property (described in the financing statement) that was *owned* by Jerry and Laurie Kurtz. Whether they owned this feed was a collateral issue, necessary to establish the element of conversion set forth above, and it depended entirely upon Jerry's status with his grandfather—if Jerry was a cash rent tenant, then he was the owner of the crops produced on the land; but if he was custom farming, his grandfather retained all ownership rights to the crops produced.

The trial judge correctly concluded that the contract between Jerry and his grandfather was a conditional one that related to financing. Whether it was a subsequent condition (a contract of cash rent that was dependent upon Jerry's obtaining financing

at a later time) or a precedent condition (one to custom farm, but to be converted to a cash rent if financing was obtained), *Donaldson v. Farm Bureau Life Ins. Co., ante* p. 140, 440 N.W.2d 187 (1989), and *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985), is immaterial because the evidence clearly established as a matter of law that Jerry attempted to obtain financing from the spring of 1983 through the spring of 1985 and that he was unable to do so. The condition of the contract, whether precedent or subsequent, not being met, Jerry was relegated to the status of custom farming, and whatever interest he had in the feed was defeated.

Even if the Bank was arguing that the terms of the contract are ambiguous and Jerry's status as a tenant subject to interpretation, a proposition with which we do not agree, it would furnish the Bank no basis for relief. We have recently pointed out that the construction of a contract is a matter for the court to determine. *International Harvester Credit Corp. v. Lech,* 231 Neb. 798, 438 N.W.2d 474 (1989); *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989). This means it is for the court to initially decide whether a provision in the contract is susceptible to more than one meaning and therefore ambiguous. Once the court has determined that ambiguity exists, interpretation of the meaning of the ambiguous term or terms becomes a question of fact to be submitted to the trier of fact. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). Implicit in the trial court's conclusion that reasonable minds could reach only one conclusion is a finding that the contract is not ambiguous.

The court's having concluded that all assignments of error are without merit, the judgment of the district court is affirmed.

AFFIRMED.

DALE A. THOMAS, APPELLANT, V. MARVIN E. JEWELL & COMPANY, A PARTNERSHIP, APPELLEE.

440 N.W.2d 437

Filed May 26, 1989. No. 87-258.

1. **Accounting: Partnerships: Equity: Appeal and Error.** An action for an accounting from former partners is an action in equity. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Accounting: Partnerships: Words and Phrases.** When partners do not agree upon a definite term or undertaking of the partnership, it is a partnership at will. A partner, by express will, may dissolve a partnership at any time, and a dissolving partner has a right to an accounting.
3. **Res Judicata.** In determining whether res judicata applies in a given instance, the operative pleadings, judgment, and evidence introduced in the prior proceedings must be examined.
4. **Partnerships: Actions.** One partner cannot maintain an action at law against his copartner on matters relating to partnership business until the accounts of the partnership have been settled.
5. **Pleadings: Appeal and Error.** The right to amend pleadings rests within the sound discretion of the trial court, and the allowing of an amendment will not be error unless prejudice resulted. Such prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded with directions.

James M. Bausch and David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

WITTHOFF, D.J.

Dale A. Thomas filed a petition in the district court for Lancaster County seeking an accounting from his former partners in an accounting firm, Marvin E. Jewell & Company

(Jewell & Co.). Jewell & Co. counterclaimed and sought damages resulting from Thomas' alleged wrongful dissolution of the partnership. At trial, Jewell & Co. amended its counterclaim to include a cause of action on a promissory note.

The district court found Thomas' accounting action was barred by the "unclean hands" doctrine, and awarded Jewell & Co. $264,095 on its counterclaim for wrongful dissolution. Jewell & Co. was also awarded $219,998 plus interest on its Union Bank and Trust Company note claim.

Thomas timely appealed, claiming the district court erred (1) in holding Thomas wrongfully dissolved the partnership, (2) in determining Thomas' entitlement to his accrual capital account in Jewell & Co., (3) in applying the unclean hands doctrine to bar Thomas a recovery, (4) in awarding Jewell $219,998 plus interest on the bank note counterclaim and in not holding this claim was barred by res judicata by virtue of a prior judgment, (5) in failing to sustain Thomas' motion for a new trial, (6) in allowing Jewell & Co. to file an amended counterclaim at trial, and (7) in overruling Thomas' objection to the opinion testimony of Warren Hinze. We affirm the trial court's finding against Thomas on the note and reverse its findings regarding wrongful dissolution and Thomas' accounting action.

While the appellant brings eight assignments of error, the two major issues to address are: Is Thomas liable for wrongful dissolution of Jewell & Co., and is Jewell & Co.'s counterclaim on the note barred by res judicata?

This action is one in equity, and this court reviews the findings of the lower court de novo on the record. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Frenzen v. Taylor, ante* p. 41, 439 N.W.2d 473 (1989); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987).

In 1963, Marvin E. Jewell (Jewell) founded defendant-appellee, Jewell & Co., a partnership of certified

public accountants. Dennis R. Baumert became a partner in 1965; other partners joined and left the firm between 1963 and 1977. Plaintiff-appellant, Thomas, began his employment with the firm in 1969 and became a partner effective January 1, 1977. In 1980, Ronald Culwell became a partner, and Robert C. McChesney became a full partner in 1981.

When Thomas became a partner, he paid $90,000 for his 10 percent interest. Of this amount, $8,656 was paid to the partnership. The balance of $81,344 was paid 60 percent to Jewell ($48,807) and 40 percent to Baumert ($32,537). To finance his buy-in, Thomas borrowed the $90,000 from Union Bank. At the same time he also renewed an older note for $25,000, making the new note $115,000.

When Thomas became a partner, the partners developed a formula for distribution of partnership income. Each partner was assigned a target "salary," determined yearly based upon the capital ownership and experience. The partners were paid a biweekly draw based on this "salary," which was charged to their drawing account. Excess cash, when available, was paid according to the target "salaries" as well.

Final distribution of the partnership income was made after the tax return for each year was completed. Any income which exceeded the amount for the target "salaries" was distributed according to capital ownership. The partners did not discuss allocation in the event the partnership income was less than the assigned "salaries."

Jewell prepared the firm's tax returns for the years 1977 and 1978 and divided the income according to the agreed formula. In the years 1979, 1980, and 1981, Thomas prepared the partnership tax returns. In 1980 and 1981, the profit level of Jewell & Co. was not enough to meet the target "salaries" for that year. As noted above, there was no agreement to deal with this contingency. Thomas assigned the shortfall according to capital ownership in the firm. Although no other partner agreed to this method, the returns were signed by Jewell, and the IRS schedules K-1 were given to each partner. In 1980, this method of allocation resulted in an income for Thomas, with a 10 percent share, about the same as that of Baumert, a 16-year partner with a 34 percent share. In 1981, Thomas' income was

higher than that of Baumert and Jewell, a 41 percent partner, and almost twice as much as Culwell and McChesney, both 10 percent partners.

After the 1981 return was completed, all of the partners with the exception of Thomas were dissatisfied with the way profits were distributed in the previous 2 years. A meeting was held on June 17, 1982, at which time the profit division for 1982 income was discussed. Suggestions were made to the effect that the income allocation system be revised, although the matter was left for later discussion.

In subsequent discussions among the partners, Thomas claimed he was not aware of any inequity in income distribution before the meeting of June 17, although he conceded a new system would have to be devised for the current year. While salaries were not discussed at the next partnership meeting on December 9, 1982, the partners decided 1982 income distribution would be agreed upon at a meeting to be held on January 11, 1983.

As of November 1981, Thomas owed the Union Bank $143,630. Ross Wilcox, a bank official, asked Thomas for additional collateral to secure the debt. That same month Thomas asked Jewell and Baumert if the partnership would guarantee a note, with the payments to come from Thomas' drawing account with the firm. In December the partners signed the note for $145,000 personally and as partners, with the note indicating that each signer was a maker. The note was in the name of Jewell & Co., but the entire proceeds went to Thomas and were used to retire his personal debts; no other partners received any of the money. The other partners signed the note with the understanding that Thomas would pay off both principal and interest on the note. The partners were aware Thomas' income would not permit him to pay the note in full before it was due and expected Thomas would pay the interest on any renewal notes which would be needed.

A few days after the note was signed, a discussion took place in which it was proposed that McChesney become a full partner in Jewell & Co. Thomas attended this meeting where firm liabilities and assets were discussed. The Union Bank note was described as Thomas' own debt, not a firm liability. Jewell also

stated Thomas would repay the debt. Thomas sat next to Jewell and neither objected nor made any comment.

Thomas prepared a working balance of the firm's financial condition as of December 31, 1981. He testified at trial that a note payable of the firm's would be shown as a liability on the firm's balance sheet, but he did not include the Union Bank note thusly on the working balance. The note was not included as a liability by Thomas when he prepared the firm's 1981 tax return.

This note was generally referred to by the other partners as the "Dale Thomas" note. In July 1982, Jewell had the partnership pay $3,000 in principal on the note and charge this amount to Thomas' drawing account, and informed Thomas of his actions. In December of the same year, $1,000 in principal and $23,989 in interest were paid and charged in the same manner. Thomas made no objections to the fact that his account was being charged. Thomas' income was not enough to pay the full amount that was due during the term of the note, and when the original note became due on December 1, 1982, the partnership signed a renewal note. After this renewal, the note was carried as a liability on the partnership's balance sheet.

The note was renewed each time it became due, with each renewal note bearing a variable interest rate save the last, which bears an interest rate of 10.5 percent. Between December 1, 1981, and the trial, Jewell & Co. paid $4,000 in principal and $50,802 in interest. As of June 5, 1986, the balance due on the note was $188,578, including interest. The interest was accruing at the rate of $52.95 per day.

According to Thomas, by the middle of December 1982, he had heard from three separate sources that he was to be "terminated" by January 1, 1983. Thomas decided to dissolve the partnership and form his own accounting firm. Two employees of Jewell & Co., James Watts and Michael Hershberger, agreed to join Thomas in the new venture. The three then hired Laurie Garrison, a Jewell & Co. receptionist, to work for the new firm.

During the weekend before December 20, 1982, Thomas obtained a list of Jewell & Co. clients from the firm files to select the clients that he, Watts, and Hershberger had served

and which they thought would retain the new firm. On the evening of December 19 or 20, 1982, Thomas and Watts went to the offices of Jewell & Co. after business hours and removed the files of the selected clients. Thomas did not inform the other partners of his action prior to taking the files. On December 21, 1982, Thomas told Baumert that he was leaving and dissolving the partnership.

The three new partners set up their own firm and contacted those clients whose files were in their possession. The new firm said it assumed that the clients would wish to have them continue offering services unless they were told differently. They also contacted clients whose files they did not have and said they wished to have their business. A form was included to be sent to Jewell & Co. instructing that the client's file be turned over to the new firm. Similar letters were sent by Jewell & Co. to the clients whose files were taken by Thomas. Most of the clients stayed with the firm that possessed the client file.

Following a bench trial, the court made extensive findings of fact. The court found: (1) Thomas received the full share of partnership income due him for 1982; (2) Thomas was not entitled to have his capital account credited with the amount of money paid to Jewell and Baumert for his 10 percent ownership of Jewell & Co.; (3) the partners agreed that when a partner left to establish a competing accounting firm, that partner would receive the net amount of his accrual basis capital account based on book value; and (4) the partnership acted properly in charging Thomas' drawing account for the 1982 payments of interest and principal made on the Union Bank note. The court also found Thomas was not entitled to an accounting based on the "unclean hands" doctrine. Thomas was guilty of unclean hands because of his alleged wrongful dissolution of the partnership. The court then awarded $220,000 damages for the wrongful dissolution it found on the part of Thomas and $43,890 damages to accounts that were uncollectible allegedly because of the letters sent by Thomas, which Jewell & Co. claims urged the clients to question billings sent by Jewell & Co.

Thomas alleges several errors were made in determining the damages awards. First, Thomas disputes the partners agreed on the amount to be paid a partner leaving to establish a competing

firm. At the June 17, 1982, meeting, the partners discussed provisions to be included in a written partnership agreement to be prepared in the future. Culwell's notes of the meeting reflect the items agreed upon for inclusion in the future agreement. One of the agreed-to items provided that any partner who withdrew from the firm to go into competition with Jewell & Co. as a certified public accountant would receive only the net amount of his accrual basis capital account based on book value.

Clearly, there is a dispute between the parties on this issue. Although the agreement was never formalized, the lower court found that a meeting of the minds existed as to what a partner in Thomas' position would get. There is evidence in the record to support the court's finding; therefore, we accept that the trial court accepted the version advanced by Jewell & Co.

The trial court found, under the agreement, Thomas should have received $47,591. This amount includes: (1) $18,635 (cash basis of Thomas' capital account), plus (2) $23,284 (accrual basis for 10 percent of accounts receivable on December 17, 1982) and $8,179 (10 percent of work in progress on December 17, 1982), less (3) $1,645 (10 percent of accrued expenses on December 17, 1982) and $862 (10 percent of writeoffs taken in May of 1983 for uncollectible accounts).

Second, Thomas argues several items should have been added to his capital account. According to Thomas, his account should be credited for $81,344 paid to Jewell and Baumert when Thomas bought into the partnership. There is no basis for this claim.

Of the $90,000 Thomas paid for his 10 percent interest, only $8,656 went to the partnership itself and was credited to his account; the balance was paid to Jewell and Baumert as individuals. Thomas knew the partnership records and tax returns reflected only a $8,656 contribution to capital. This is to say no more than that Thomas' payment was both to buy part of Jewell's and Baumert's interests in the firm and make a small capital contribution. The trial court did not err in refusing to add $81,344 to Thomas' capital account.

Thomas also claims his capital account was improperly charged for $23,989 in interest on the Union Bank note.

Thomas testified he agreed his capital account could be charged for payments made on the note, but he claims he only agreed to pay 8 to 10 percent in interest. The trial court is in a better position to evaluate a conflict in evidence. There is sufficient evidence in the record to support the trial court's finding, which we accept as it appears.

Thomas next claims he received $34,075 less in income than he was entitled, based on the fact that the income allocation formula was changed after Thomas left Jewell & Co. The method to be used to allocate 1982 income was to be decided at the meeting in January 1983. The partnership was dissolved prior to that meeting, and there was no agreement between the partners as to how the profit or losses for 1982 were to be divided before dissolution. Neb. Rev. Stat. § 67-318 (Reissue 1986) provides the partners rights shall be decided by agreement. Outside of "ordinary matters connected with the partnership business," all decisions which are contrary to the basic agreement or a course of dealing amounting to an agreement must be unanimous. *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (1985). There was no unanimous agreement to a new formula for income distribution. Thomas is therefore entitled to have his share of the division of profits based on the same formula as used in 1980 and 1981.

Thomas argues no adjustment should have been allowed for writeoffs taken in May 1983. These adjustments were taken to clear uncollectible debt. As the trial court found, these writeoffs were properly allowed as actions that would ordinarily have been handled in the winding up process of a partnership.

Finally, Thomas argues he is entitled to 10 percent of the goodwill of Jewell & Co., which he calculates at $125,650. This figure equals 10 percent of one times Jewell & Co.'s gross receipts for 1982, which according to Thomas is the proper method of determining the value of the goodwill of an accounting firm. A partner who does not wrongfully dissolve a partnership is entitled to his share of the partnership's goodwill. Neb. Rev. Stat. § 67-338 (Reissue 1986). However, each of the two factions took the clients and whatever goodwill was available at the time of dissolution.

Thomas also claims the district court erred in denying Thomas an accounting, finding his action was barred by the "unclean hands" doctrine. Nebraska law gives a dissolving partner an absolute right to an accounting regardless of the reason for the dissolution. Neb. Rev. Stat. § 67-343 (Reissue 1986). Thus, even if the trial court correctly determined that the dissolution was wrongful, Thomas is entitled to an accounting and to his share of the partnership assets less any damages caused by his manner of dissolution.

The trial court based its finding regarding the equitable doctrine of unclean hands on *Hart v. Dietrich*, 69 Neb. 685, 96 N.W. 144 (1903). *Hart* says that a partner leaving without prior notice may be estopped by his unclean hands from recovering in an accounting action. However, *Hart* was decided long before Nebraska adopted the uniform partnership act, is in conflict with the statute, and, therefore, is no longer applicable. However, if the trial court had been correct in determining Thomas wrongfully dissolved the partnership, he would still have been held liable for damages caused by that dissolution. § 67-338.

Thomas claims the trial court erred in awarding Jewell & Co. damages on its "wrongful dissolution" counterclaim.

There is no evidence indicating that Jewell & Co. was to exist for any specified length of time. When the partners do not agree upon a definite term or undertaking of the partnership, it is a partnership at will. *Frey v. Hauke*, 171 Neb. 852, 108 N.W.2d 228 (1961). Jewell & Co. was a partnership at will. Any partner, by express will, may dissolve a partnership at any time. Neb. Rev. Stat. § 67-331 (Reissue 1986).

Thomas argues that since no written partnership agreement existed, he could not dissolve the partnership in contravention of an agreement. This argument ignores the fact that a partnership agreement need not be written; by its very nature, the existence of a partnership implies an agreement.

However, it is unnecessary for us to consider the issue whether a dissolution may be wrongful without a written partnership agreement; in this case, we find no wrongful dissolution occurred. Thomas did nothing to harm the partnership while he was a member. His method of income

allocation was acquiesced to by the partners. Prior to the dissolution, he had the right to possess the client files. Pursuant to the agreement, Thomas was as free to pursue former clients as was the new version of Jewell & Co. Nothing which occurred after the partnership was dissolved is applicable to the determination of this issue. Therefore, the trial court erred in awarding any damages for wrongful dissolution.

In this appeal, Thomas also claims the trial court erred in granting Jewell & Co. recovery on the note. Thomas contends this action should have been barred by res judicata. We disagree.

This court recently affirmed the holding of the district court in that case in *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). There, the trial court held Jewell & Co. was the maker of the note and not an accommodation party, and Jewell & Co. was not allowed to recover on its accommodation claim.

In determining whether res judicata applies in a given instance, the operative pleadings, judgment, and evidence introduced in the prior proceedings must be examined. *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984). The testimony given and exhibits introduced at the accommodation trial were introduced as exhibits in the present action, and the trial court took judicial notice of the pleadings.

A review of the pleadings in the earlier case shows us that Thomas was only contending that he was not liable to Union Bank. Instead, he argued he *was liable* to Jewell & Co. on the oral agreement. Thus, the original action was based solely upon the note between Union Bank and Jewell & Co. The counterclaim involves the underlying transaction between Jewell & Co. and Thomas, which required different proof. The result of the prior action was that Jewell & Co. had primary liability on the note, not liability as an accommodation party. It did not go to the merits of Thomas' liability to the partnership.

In addressing the issue of res judicata in its findings of fact, the district court stated:

> The prior action was only a determination of whether Jewell & Co. was entitled to recover on its legal theory that it was an accommodation party, and all other theories for

> recovery of the debt were reserved for trial in this equitable action between partners. Further, it was understood by the court and the parties that Jewell & Co. would be entitled to proceed in this fashion, and it is doubtful, in fact, that Jewell [& Co.] could have asserted its other theories of relief in the note action since there had been no prior accounting between the partners. E.g., Linch v. Linch, 145 Neb. 792, 18 N.W.2d 98 (1945); RESTATEMENT (SECOND) OF JUDGMENT §26(1)(a), (b), (c) (1982).

In *Linch v. Linch,* 145 Neb. 792, 18 N.W.2d 98 (1945), we held that one partner cannot maintain an action at law against his copartner on matters relating to partnership business until the accounts of the partnership have been settled. In the counterclaim, Jewell & Co. contends there was an agreement among the partners that the partnership would make the payments of principal and interest on the note and charge the payments to Thomas' drawing account. As such, the counterclaim was based on the relationship of the partners within the partnership. It was not the type of action that could have been maintained prior to the accounting action.

Since Jewell & Co.'s counterclaim was not one which could have been maintained as an action at law prior to a settlement of the partnership accounts, it is not an issue which "could have been raised in the prior proceeding," and, thus, res judicata will not apply. *State ex rel. Douglas v. Morrow, supra.* Jewell & Co. is entitled to recover on the oral agreement which the court found existed between Thomas and the other four partners.

Further, a claim may be split when the parties have "agreed in terms or effect that the plaintiff may split his claim, or the defendant has acquiesced therein." Restatement (Second) of Judgments § 26(1)(a) at 233 (1982). It would be unfair to allow Thomas to prevent Jewell & Co. from attempting to recover on the alternate theories when it was clear he consented to have the issue of his liability decided at a later action.

Thomas also raises the issue of the testimony of Warren Hinze. Thomas objected to the admission of Hinze's opinion testimony at trial concerning the effect of the announcement letters Thomas' new firm sent to Jewell & Co. clients as being outside his area of expertise and based upon speculation and

conjecture. In light of our disposition of Jewell & Co.'s wrongful dissolution claims, this matter need not be discussed.

Thomas also argues that the trial court erred in allowing Jewell & Co. to amend its answer and counterclaim during trial.

> The right to amend pleadings rests within the sound discretion of the trial court and the allowing of an amendment will not be error unless prejudice resulted. . . .
>
> . . . .
>
> Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact.

Collection Associates, Inc. v. Eckel, 212 Neb. 607, 608-09, 324 N.W.2d 808, 809-10 (1982).

Thomas argues the amendment caused him prejudice because he did not have any prior notice that Jewell was going to rely on an oral agreement theory. Such an argument rests in large part upon what was in the pleadings of Jewell & Co. The transcript which Thomas asked for, and which was filed with this court, does not contain any prior pleadings of Jewell & Co. It contains only the second amended answer and counterclaim of Jewell & Co. Based upon the record *as it exists*, it is difficult to say that the trial court abused its discretion in allowing Jewell & Co. to amend its counterclaim, because there is no indication, other than Thomas' assertions, that new issues were raised by the amended pleading.

In conclusion, (1) no damages for wrongful dissolution should have been awarded, nor should Thomas' action for an accounting be barred by the doctrine of unclean hands. Thomas is entitled to his capital account as determined by the trial court. (2) The trial court did not abuse its discretion in allowing Jewell & Co. to present its note claim, and this claim is not barred by the doctrine of res judicata. (3) Thomas' share of the profits should have been determined on the formula used for the 1980 and 1981 division. (4) The parties received all of the goodwill to which they are entitled. (5) Any amounts found owing to Thomas by Jewell & Co. can be offset by the amounts owed by Thomas to Jewell & Co. on the note claim.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

PARK PLACE PONTIAC-CADILLAC-GMC, INC., A NEBRASKA CORPORATION, APPELLANT, V. NEBRASKA MOTOR VEHICLE INDUSTRY LICENSING BOARD ET AL., APPELLEES.

440 N.W.2d 445

Filed May 26, 1989. No. 87-615.

1. **Administrative Law: Appeal and Error.** The Supreme Court's review of an administrative agency's decision under the Administrative Procedure Act is de novo on the record. The court makes independent findings of fact without reference to those made by the agency whose action is being reviewed.
2. _____: _____. A board's failure to make a specific determination of undue negligence or willfulness may not be fatal if the record supports such determination.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, and Hyman Polsky for appellant.

John R. Doyle, of Doyle & Doyle Law Office, for appellee Motor Vehicle Industry Licensing Board.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

SPRAGUE, D.J.

From January 21 through April 4, 1986, Park Place Pontiac-Cadillac-GMC, Inc. (Park Place), of Lincoln, Nebraska, rented approximately 40 motor vehicles to ABC Circle Films. These vehicles were used in the filming of the miniseries "Amerika." Title to the vehicles remained in, and the vehicles bore dealer plates of, Park Place, in violation of Neb. Rev. Stat. §§ 60-320 and 60-1411.02(13) (Reissue 1988). Park Place paid the necessary taxes and fees and registered the vehicles as required after some 3 months of improper use.

A hearing was held before the Nebraska Motor Vehicle Industry Licensing Board (board) and the motor vehicle dealer's license of Park Place was suspended for a period of 72 hours. The district court for Lancaster County affirmed the action of the board.

The assignments of error relate to (1) the failure of the board to make specific findings of undue negligence or willfulness, (2)

the lack of competent evidence, and (3) the excessiveness of the penalty imposed.

The statutes governing the board require the board to

> state in writing, officially signed by the chairperson or vice-chairperson and the executive director, its findings and determination after such hearing and its order in the matter. . . . If the board shall determine that the license holder has willfully or through undue negligence been guilty of any violation of Chapter 60, article 14, or any rule or regulation adopted and promulgated by the board under authority of Chapter 60, article 14, his or her license may be suspended . . . .

Neb. Rev. Stat. § 60-1415 (Reissue 1988). The board made written findings but did not specifically determine that the appellant acted willfully or through undue negligence.

The Supreme Court's review of an administrative agency's decision under the Administrative Procedure Act is de novo on the record. The court makes independent findings of fact without reference to those made by the agency whose action is being reviewed. *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986). The court imposes an independent conclusion of law based on the independent findings of fact. Therefore, the failure of the board to make a specific determination of undue negligence or willfulness is not fatal if the record would support such a determination.

After reviewing the record de novo, we find that the actions of Park Place were unduly negligent.

The suspension of 3 days is well within the range of options that the board may impose and is not excessive. The judgment of the district court should be affirmed.

AFFIRMED.

WILLIAM A. WOLLENHAUPT AND NASHUA CORPORATION, A NEBRASKA CORPORATION, APPELLANTS, V. ANDERSEN FIRE EQUIPMENT CO., INC., A NEBRASKA CORPORATION, APPELLEE.

440 N.W.2d 447

Filed May 26, 1989. No. 87-741.

1. **Trial: Negligence: Pleadings: Proximate Cause: Proof.** Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but is one entirely consistent with and provable under the general issue.
2. **Trial: Negligence: Liability: Proof.** If a defendant has a duty to foresee a particular type of harmful force, such as a fire, and guard others against the harm that the force can do, and the defendant fails in his duty, the cause of the fire is irrelevant to the liability of the defendant. Therefore, the plaintiff does not have the burden of proving what caused the fire, nor does he have the burden of negating his negligence as a cause of the fire.
3. **Trial: Jury Instructions.** A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict.
4. **Rules of Evidence: Negligence.** The theory underlying the rule excluding evidence of subsequent remedial measures is that because action taken after an incident reflects hindsight, an inference of negligence would be improper, as this inference would assume that because the defendant had learned from the accident, he should have learned before the accident. In addition, it is feared that admission of subsequent measures will deter against taking the precaution.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for a new trial.

J. Patrick Green; Jay L. Welch, of Rickerson, Welch & Kruger; and Philip M. Kneifl, of Kneifl & Kneifl, for appellants.

Dean F. Suing and Francis T. Belsky, of Katskee & Henatsch, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

WHITE, J.

The plaintiff-appellant William A. Wollenhaupt is an employee of the plaintiff-appellant Nashua Corporation, a manufacturing plant located in Omaha, Nebraska. On

November 11, 1981, Wollenhaupt was working at Nashua as research director for the identification products division and was responsible for maintenance of quality control. On that day he was checking coating machines, since Nashua was having a streaking problem with the coaters.

The coaters are devices very similar in appearance to printing presses. However, while printing presses apply ink to paper, coaters apply adhesive material to paper products. The material toluene, a solvent which carries the solid adhesives, was not being uniformly applied to the paper. Toluene is a highly flammable substance.

Wollenhaupt was standing to the side of the coater, approximately an arm's length away, when suddenly he heard a "whoosh" and saw flames. He turned immediately to his right and tried to run, but the fire caught him from behind.

As a result of the fire, Wollenhaupt sustained third degree burns over 50 to 55 percent of his body, running from his shoes to his belt line. He required 10 skin grafts and underwent physical therapy until March of 1984. Because Wollenhaupt was compensated for his injuries by the workers' compensation carrier of Nashua Corporation, that carrier is subrogated to the extent of compensation, and therefore Nashua is named as an additional plaintiff to this action.

A number of coater devices were present in the room where the fire occurred. Each coater is protected by a Cardox fire protection system installed over the coater. This system is an automatic system activated by heat. When activated, the system releases carbon dioxide (CO_2), and the fire is extinguished. The defendant, Andersen Fire Equipment Co., Inc. (Andersen), installs and services fire protection equipment.

Although Andersen did not install the Cardox system for Nashua, it did provide service for the system for a number of years. On October 30, 1981, an employee of Nashua noticed that the pressure gauges on the automatic trip cylinder of the Cardox machine were low, and Nashua contacted Andersen, requesting that it send someone to service the system.

The automatic trip system did not automatically operate when the fire which injured Wollenhaupt started on November 11, 1981. Instead, employees were required to manually trip the

system.

Evidence was introduced concerning a prior fire that occurred in April 1981. On that occasion the automatic system tripped, the fire extinguished, and no one was injured. A subsequent fire occurred on November 17. The district court refused to admit evidence relating to this fire.

The heart of the plaintiffs' case is the contention that the defendant had the responsibility to service the fire extinguisher system and negligently performed that duty. The plaintiffs contend that either because of the incompetence of the defendant's employees or because the inspection was completely left undone, the Cardox system had an inadequate charge in the trip cylinder, and therefore the fire could not be extinguished. In addition, the plaintiffs contend that had the automatic system functioned, Wollenhaupt would have suffered only slight injuries or no injuries at all.

In contrast, the main contention of the defendant is that the Cardox system was not a life protection system. Because it was not a life protection system, activation of the system was dependent upon the heat detector over the coater. Therefore, if the fire had its central locus away from the coater, a circumstance the defendant alleges was present in this case, a delay in the activation of the system would result, and the fire would spread too quickly to be contained by the Cardox system. Primarily the defendant was attempting to negate causation: Even with the system operating properly, Wollenhaupt would still have been injured; therefore, any alleged negligence on the part of the defendant was not the cause of the injuries suffered by Wollenhaupt.

The appellants contend that the district court erred in three respects: first, in refusing admission of the evidence relating to the fire that occurred on November 17; second, in giving an instruction which, in essence, required the plaintiffs to negate the conduct of Nashua Corporation as the sole proximate cause of the accident on November 11; and finally, in giving an instruction regarding when an intervening cause will break the chain of causation.

Instruction No. 11 as given by the district court provided:

> One of the issues in this case is whether the occurrence

> was caused by the conduct of Nashua Corporation. If you find the sole proximate cause of the occurrence was the conduct of Nashua Corporation, then your verdict should be for the defendant.
>
> The burden of proof on this issue is on the plaintiff; that is, the plaintiff has the burden to prove that some negligence of defendant as set forth in Instruction No. 2 was the proximate cause or a proximately-contributing cause of the occurrence and that therefore the negligence of Nashua Corporation was not the sole proximate cause.

This instruction is essentially a reiteration of NJI 2.01A. The appellants contend that this instruction was given in error because no issue concerning the negligence of Nashua was present in this action, and therefore any instruction given regarding the culpability of Nashua was irrelevant.

The appellee contends that the present action is governed by this court's opinion in *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 211 N.W.2d 914 (1973). In *Fisher,* we stated at 702-03, 211 N.W.2d at 917,

> " 'Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue.' "

According to the appellee, the issue of the negligence of Nashua was claimed in this case, and therefore the instruction was not in error. We disagree.

No claim was made by the appellee that Nashua was the sole proximate cause of the accident. Wollenhaupt is not claiming that Andersen *caused* the fire which injured him. Instead, the claim is that if Andersen had properly serviced the Cardox machine, the fire, whatever its origin, would not have caused Wollenhaupt to suffer severe injury. The origin of the fire in this case was therefore irrelevant. Additionally, Andersen never actually claimed that the negligence of a third party (Nashua) was the sole proximate cause of the injuries of Wollenhaupt. Instead, Andersen's claim was that the Cardox system operated

as it was designed to: The system was designed only to save the coating machine, not perform a lifesaving function. Therefore, Wollenhaupt would not have been protected by the system because life protection was not the purpose of the Cardox machine.

The appellee attempts to argue that "it was not the 'failure' of the Cardox system that caused Wollenhaupt's injuries. Rather, it was the failure of Nashua to make adequate modifications or adjustments to the coater at the time they changed their manufacturing process," brief for appellee at 31-32, and this failure to make adjustments caused the fire to break out in the coater. This argument is misplaced. Again, the claim is not that the appellee, Andersen, negligently started the fire, but that the fire, whatever its origin, would have been extinguished had the Cardox system been properly maintained and, had it been so maintained, Wollenhaupt would not have suffered injury.

If a defendant has a duty to foresee a particular type of harmful force, such as a fire, and guard others against the harm that the force can do, and the defendant fails in his duty, the cause of the fire is irrelevant to the liability of the defendant. The plaintiff therefore does not have the burden of proving what caused the fire, nor does he have the burden of negating his negligence as a cause of the fire. See *Empire State Building Co. v. Bryde*, 211 Neb. 184, 318 N.W.2d 65 (1982).

The cause of action involved in this case, as alleged by Wollenhaupt, was not the negligent starting of a fire, but the negligent maintenance of the Cardox fire protection system which, when it failed to extinguish the fire, proximately caused Wollenhaupt's injuries. Therefore, the cause of action is not for negligently starting a fire but, rather, for negligently maintaining fire protection equipment which should have extinguished the fire once it was started.

The error in the instruction mandates that the judgment be vacated and the cause remanded for a new trial. " ' "A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict." ' " *Empire State Building Co., supra* at 192, 318 N.W.2d at 70, citing *Bezdek v.*

Patrick, 167 Neb. 754, 94 N.W.2d 482 (1959). Because the instruction given contained an irrelevant issue, the judgment in this case is vacated and the cause remanded for a new trial.

Since this case will be retried, it is necessary to discuss the contention of the appellants that the trial court improperly excluded evidence of a fire that occurred on the premises of Nashua Corporation on November 17, 6 days after the incident at issue. In excluding this evidence the district court stated:

> [I]t would seem to me to be a situation that we'd be getting into a situation that since a fire did occur again, that it would be prejudicial to Andersen and I think extremely prejudicial to the defendant to show that is the case because I think that would make it patently obvious that something was not being done that should have been done, maybe in the first situation, the November 11th fire
> . . . .

At this point the district court cited no rule of evidence. However, the court previously indicated that it believed the evidence to be barred by application of rule 407 of the Nebraska rules of evidence. This belief was in error.

Neb. Rev. Stat. § 27-407 (Reissue 1985) provides in relevant part:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The scope of rule 407, therefore, is intended to apply in situations in which subsequent remedial measures were taken. There was no evidence of any subsequent conduct by the defendant which could be found to be a remedial measure. The basis of the plaintiffs' offer of proof was that the Cardox machine had *not* been altered between November 11 and November 17. While it is true a subsequent event was being offered, no evidence of a subsequent precaution was proposed.

The theory underlying the rule excluding evidence of subsequent remedial measures is that because action taken after an incident "reflects hindsight rather than foresight," an inference of negligence would be improper, as this inference would assume that because the defendant had learned from the accident, he should have learned before the accident. In addition, it is feared that admission of subsequent measures will deter against taking the precaution. 2 J. Wigmore, Evidence in Trials at Common Law § 283(4) (J. Chadbourn rev. 1979). Neither of these reasons is applicable in the present case. Nashua adopted the Cardox system long before the fire. The only claim is that Andersen was negligent in maintaining the system. If evidence of the success of the system at the subsequent fire supported an inference of negligence on the part of Andersen, it was not because of anything learned from the first fire. All parties agree that the CO_2 cylinders had to be properly charged to operate. Therefore, the fear of deterring subsequent safety measures is not at issue in this case. Most importantly, however, no subsequent remedial act was undertaken by Andersen. Instead, as no one was injured at the fire on November 17, evidence of this subsequent fire during which the protection system allegedly operated properly merely refutes the contention of the appellee that the system was not intended to be a life protection system. Because no modifications or added safety measures were taken between the first and second fire, application of rule 407 to exclude evidence of the subsequent fire was error.

Therefore, this action is remanded for a new trial with the instruction to admit the evidence of the subsequent fire.

REVERSED AND REMANDED FOR A NEW TRIAL.

DOUGLAS CARNES, APPELLEE AND CROSS-APPELLANT, V. JERRY L. SCHRAM ET AL., APPELLEES, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, GARNISHEE-APPELLANT AND CROSS-APPELLEE.

440 N.W.2d 451

Filed May 26, 1989. No. 87-795.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
2. _____. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.
4. _____: _____. The denial of a motion for summary judgment is not an appealable order.
5. **Motor Vehicles: Insurance: Words and Phrases.** In order for a nonowned motor vehicle to be covered as a "temporary substitute car" under an insured's policy of insurance, the nonowned motor vehicle must be in the possession of or under the control of the insured to the same extent and effect as the disabled car of the insured would have been except for its disablement.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded with directions.

Joseph K. Meusey and Michael F. Coyle, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for garnishee-appellant.

Michael M. O'Brien, of Matthews & Cannon, P.C., for appellee Carnes.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Douglas Carnes, the plaintiff in this action, filed an application for determination of garnishee liability against State Farm Mutual Automobile Insurance Company in the

district court for Douglas County. The court sustained Carnes' motion for summary judgment. We reverse and remand with directions.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. *Schroer v. Synowiecki*, 231 Neb. 168, 435 N.W.2d 875 (1989).

A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989).

In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence. *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989).

The denial of a motion for summary judgment is not an appealable order. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

On May 18, 1982, James Schram and Richard Krajicek traveled in Schram's 1975 Ford truck from their farms in Gretna to Dunlap, Iowa, to buy feeder pigs. The truck could not hold all of the pigs the two purchased, so Schram and Krajicek each called Gretna and told his son to come to Dunlap to pick up the remaining pigs. Krajicek's son Mark drove the Krajiceks' 1969 truck, with Schram's son Jerry as passenger.

Shortly after leaving Gretna, the truck began to run poorly. Near Omaha, Jerry called his father, James Schram, who advised the boys to return home with the Krajicek truck. Schram had already returned to Gretna in his truck and had unloaded the first load of pigs, so Schram told Jerry to take that truck to Dunlap for the second load of pigs. Jerry did so, with Mark as his passenger. Near Crescent, Iowa, Jerry turned into the path of Douglas Carnes' motorcycle and sidecar, injuring Carnes and his wife and killing Carnes' daughter.

Carnes brought an action in Sarpy County against James

and Jerry L. Schram. Judgment was entered against the Schrams in the amount of $255,323.90 on July 17, 1984. Carnes received partial satisfaction of judgment from Farmers Mutual Insurance Company, James Schram's insurer.

Seeking satisfaction of the remainder of the judgment, Carnes filed an affidavit and praecipe for garnishment against State Farm, which had a policy on the truck owned by Richard Krajicek. Carnes' action was based on the claim that the Schram truck involved in the accident was a "temporary substitute automobile" under Richard Krajicek's State Farm policy, and therefore Jerry Schram was an additional insured under the omnibus clause of that policy. In its answer to the interrogatories in garnishment, State Farm denied that it was indebted in any manner to Jerry Schram.

Carnes then filed an application for determination of garnishee liability. Both State Farm and Carnes filed motions for summary judgment. The district court overruled State Farm's motion and sustained Carnes' motion, and entered judgment accordingly.

There are 10 assigned errors and, in addition, Carnes cross-appeals on the issue of the award of interest on the judgment, but it is only necessary for us to determine whether Schram's truck was a temporary substitute automobile under Krajicek's insurance policy in order to dispose of this controversy.

There are two sections of the State Farm policy critical to a determination of this case.

> ***Temporary Substitute Car***—means a ***car*** not owned by ***you*** or ***your spouse*** if it replaces ***your car*** for a short time. Its use has to be with the consent of the owner. ***Your car*** has to be out of use due to its breakdown, repair, servicing, damage or ***loss***. A ***temporary substitute car*** is not considered a ***non-owned car***.
>
> . . . .
>
> **Who Is an Insured**
>
> When we refer to ***your car***, a ***newly acquired car*** or a ***temporary substitute car, insured*** means:
>
> 1. ***you***;
>
> . . . .

4. any other ***person*** while using such a ***car*** if its use is within the scope of consent of ***you*** or ***your spouse*** . . . .

(Emphasis in original.)

Jerry Schram would be covered as an insured under the State Farm policy *only* if he was using Krajicek's temporary substitute automobile with Krajicek's permission and, of course, *only* if the truck belonging to James Schram and being used by Jerry Schram can be said to be a temporary substitute automobile of Richard Krajicek's.

There is nothing in the record from which it can be inferred that James Schram ever loaned his truck to Richard Krajicek or that the latter ever asked for its use. The two fathers had hogs yet to be picked up at Dunlap, Iowa, after the initial trip. As is the custom in rural communities, farmers help each other out. Other than a matter of courtesy, Schram having furnished his truck for the first trip, there was no obligation on the part of Richard Krajicek to provide the transportation for the second trip. The hogs needed to be picked up, and Schram had a vehicle available to do so and Krajicek did not. Schram directed his son to drive the truck to Iowa, and young Krajicek simply rode along to help with the loading. Krajicek was not in a position to nor did he attempt to grant permission to Jerry Schram to drive James Schram's truck.

In *Tanner v. Pennsylvania Threshermen & F. M. C. Ins. Co.*, 226 F.2d 498 (6th Cir. 1955), the named insured, Mike Zarzour, operated a cafe in Chattanooga, as did his brother Louis in another place in the same city. Mike's automobile, covered by the insurance policy, was in a repair shop. Louis, with his own automobile, pushed Mike's car to the garage for Mike. After driving Mike back to his restaurant, Louis turned his (Louis') car over to Mike, who drove to a curb market to get some produce and to another location to get some change. Mike then returned the car to Louis, but asked Louis to get him (Mike) some beef for use in the latter's restaurant. Louis undertook to accomplish the errand in his car and also picked up his wife and children. During this trip, Louis became involved in an accident.

Following a lawsuit in which plaintiff obtained a judgment against both Mike and Louis, the plaintiff attempted to satisfy

that award against Mike's insurance policy, asserting that Louis' car was a "substitute car" under the provisions of that policy. The district court directed a verdict for the insurance company. In affirming that action, the court of appeals said: "He [the district judge] construed the word 'substitute car' to mean a car which was in the possession or under the control of the insured to the same extent and effect as the disabled car of the insured would have been except for its disablement." *Id.* at 500.

In *Fulton v. Woodford*, 17 Ariz. App. 490, 498 P.2d 564 (1972), Sanner Contracting Company had a subcontract to do some paving and to supply the necessary dirt fill. It contracted with Conway to furnish the necessary trucks. Conway did not have sufficient trucks for the job and therefore hired Fulton to supply additional trucks. Fulton had a general automobile liability insurance policy issued by Harleysville insurance company. Fulton did not have sufficient trucks in operating condition to meet Conway's needs, so he engaged Patterson to supply his truck for a part of the hauling undertaking.

On his first run, Patterson collided with a motorcycle operated by Johannsen, which collision resulted in Johannsen's death. His widow sought a judgment for damages against all parties. The question which ultimately arose was whether Patterson's truck was a temporary substitute automobile under Fulton's policy.

In holding that the truck qualified as a temporary substitute automobile, the Arizona court stated:

> The purpose of the substitution provision is to extend coverage temporarily and automatically, without the payment of an additional premium, to the insured to protect him when he uses a vehicle not specified in the policy in place of the specified vehicle he intended normally to use but did not because of its withdrawal from use for a reason stated in the policy.

Id. at 495, 498 P.2d at 569.

The court continued by stating:

> The only reason for the use of Patterson's truck on the day in question was the disablement of one of Fulton's trucks which would have been used, had it been available, to the

> same extent as was Patterson's truck. Under these circumstances, Patterson's vehicle was a temporary substitute for Fulton's vehicle and therefore insured under the Harleysville policy.

Id. at 496, 498 P.2d at 570.

In distinguishing *Tanner v. Pennsylvania Threshermen & F. M. C. Ins. Co.*, 226 F.2d 498 (6th Cir. 1955), previously cited, the court said: "Actually the errand performed by the brother was no more than a brotherly accommodation *and was not for the purpose of fulfilling a prior undertaking of his brother.*" (Emphasis supplied.) 17 Ariz. App. at 496, 498 P.2d at 570.

Lumbermen's Mutual Cas. Co. v. Harleysville Mut. Cas. Co., 367 F.2d 250 (4th Cir. 1966), involved an action to recover from William Dalton's policy of insurance with State Farm Mutual Automobile Insurance Company under that policy's "temporary substitute" provision. William Dalton owned a 1954 Ford automobile, which was insured under the policy. His son, Ray Dalton, who was unmarried at the time and living at the home of his father, owned a 1955 Ford and had no liability insurance in effect on that automobile.

William and Ray Dalton were both employed at the Burlington Mills and drove back and forth to work. Some months prior to the accident in question, William had agreed to transport certain other persons to and from work at the same plant. Those persons agreed to pay and did pay William a certain amount per day for that transportation.

On the day in question, as William and his son prepared to leave their home and pick up the passengers, William could not get his car started. He therefore suggested that his son Ray should take his car to pick up those passengers. An accident resulted, and after obtaining judgment against the two Daltons and two other tort-feasors, the plaintiff sought to recover from the various insurance carriers, including William's insurer, State Farm. In holding that recovery might be had from State Farm, the court of appeals concluded that Ray's automobile was a temporary substitute automobile under William's insurance.

In support of its holding, the court stated:

> William Dalton according to the stipulation had an understanding with certain persons, including Gertrude

> Southern, to transport them to work. Each of them agreed to pay him for this service. There was no such arrangement with Ray. Consequently, when William's car was disabled and he suggested that Ray "would *have to take his car* to work *and pick up these passengers*," William was employing Ray's car to perform William's undertaking. . . . For the emergency, William in effect borrowed, and Ray loaned, the latter's car. Who was to drive was immaterial to William. The reality of substitution is accented by the circumstance that the two cars were kept in the same location and owned by members of the same household and family. True, Ray may have had his own purposes for the trip aside from his father's, but this does not detract from the fact that William was also using the car to do what he would have done with his own.

Id. at 254.

Thus, the legal and contractual compulsion regarding the use of the vehicles in *Fulton v. Woodford*, 17 Ariz. App. 490, 498 P.2d 564 (1972), and *Lumbermen's Mutual* is replaced in the instant case by a simple act of courteous reciprocity, and there can be no suggestion that James Schram ever intended to or did in fact loan his vehicle to Richard Krajicek, nor did the latter ever have such possession that would entitle him to authorize its use by another.

Having cited with approval *Tanner*, we adopt its rule that in order for a nonowned motor vehicle to be covered as a "temporary substitute car" under an insured's policy of insurance, the nonowned motor vehicle must be in the possession of or under the control of the insured to the same extent and effect as the disabled car of the insured would have been except for its disablement. If it is found that the alleged substitute automobile was being driven by its owner or his or her designee, and not by the named insured or his or her designee, then it was not in possession of or under the control of the named insured, and the vehicle was not a temporary substitute car within the meaning of the policy. See, also, *Babineaux v. Lavergne*, 321 So. 2d 401 (La. App. 1975); *Harte v. Peerless Ins. Co.*, 123 Vt. 120, 183 A.2d 223 (1962).

We therefore find as a matter of law that the truck owned by James Schram and being driven at his direction by his son Jerry Schram was not at that time a "temporary substitute car" of Richard Krajicek's under the latter's policy of automobile insurance issued by State Farm. Accordingly, the judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KIMCO ADDITION, INC., APPELLANT, V. LOWER PLATTE SOUTH NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION, APPELLEE.

440 N.W.2d 456

Filed May 26, 1989. No. 87-1035.

1. **Easements: Eminent Domain: Actions: Notice.** Where the holder of an easement across property has the power of eminent domain for the use involved, an action for inverse condemnation is an appropriate remedy for a subsequent bona fide purchaser of the property who purchased without notice of the preexisting interest in land.
2. **Actions: Adverse Possession: Limitations of Actions.** The period of limitations for inverse condemnation actions is the 10 years within which actions for adverse possession must be brought pursuant to Neb. Rev. Stat. § 25-202 (Reissue 1985).
3. **Actions: Assignments.** As a general rule, a cause of action is assignable if the action would, on the death of the assignor, survive to the decedent's legal representative.
4. **Actions: Eminent Domain: Assignments.** An action seeking compensation for the taking of property by the government is assignable.
5. **Property: Vendor and Vendee: Notice.** Instruments which may be but are not recorded are void as to subsequent bona fide purchasers who record first.
6. **Real Estate: Vendor and Vendee: Consideration: Notice: Words and Phrases.** A bona fide purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry.
7. **Actions: Corporations: Merger: Abatement, Survival, and Revival.** The cause of action of a corporation survives the corporation's merger into or consolidation with another corporation and becomes vested in the surviving or new corporation.
8. **Real Estate: Vendor and Vendee: Easements: Notice.** A purchaser is charged

with notice of an easement, the evidence of which is apparent from the inspection of the premises.

9. _____: _____: _____: _____. One who purchases land burdened with an open, visible easement is ordinarily charged with notice that he or she is purchasing a servient estate.
10. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus not appealable, when both parties move for summary judgment and the district court sustains one of the motions, the Supreme Court obtains jurisdiction over both motions and can determine the controversy, making an order specifying the facts that appear without substantial controversy and directing such further proceedings as it deems just.
11. **Summary Judgment.** Summary judgment is appropriate only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellant.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

CAPORALE, J.

In this inverse condemnation action, plaintiff-appellant, Kimco Addition, Inc., seeks damages for the expanded portion of an easement defendant-appellee, Lower Platte South Natural Resources District, exercises through a tract of land Kimco owns. The district court overruled Kimco's motion for summary judgment on the sole issue of its entitlement to damages, and sustained Lower Platte's motion for summary judgment, thereby dismissing Kimco's petition. Kimco assigns eight errors, which merge to challenge the district court's finding that (1) any cause of action which may have existed is time barred, and (2) in any event, Kimco failed to establish a cause of action. We affirm in part and in part reverse and

remand for further proceedings.

The easement in question embodies a drainage channel consisting of a "cut or depression in the earth," commonly known as Dead Man's Run. The portion of the channel with which we are concerned runs across an irregular tract of land located at the southeast corner of 56th and Holdrege Streets in Lincoln, Nebraska.

The easement was created in 1929 when Emma and Ada Kuhn, then owners of the tract, granted Sanitary District No. 1 of Lancaster County and "its successors and assigns forever"

> a perpetual easement and right-of-way for the construction, maintenance, building and repairing of a ditch . . . including the right of ingress and egress to and from said ditch . . . .
>
> . . . .
>
> . . . but only so much of said strip of ground is to be used in the construction of said ditch as shall be necessary for said ditch purposes . . . .

The Kuhn easement was not recorded, however, until August 15, 1942.

In 1959, in order to widen the drainage channel, Sanitary District No. 1 acquired and recorded an easement 88 feet wide, which was to "run with the land" and include a right of ingress and egress. On June 15, 1962, Sanitary District No. 1 assigned its rights in and to the aforesaid easement to the Salt-Wahoo Watershed District, which assignment was recorded April 16, 1963. As a natural resources district, Lower Platte succeeded, under the provisions of Neb. Rev. Stat. § 2-3206 (Reissue 1987), to the assets of Salt-Wahoo on July 1, 1972, and thereby acquired the aforesaid easement.

Between August 3, 1973, and May 1, 1974, Lower Platte again widened the drainage channel with the permission of the owner, Charleston Court, Inc. On January 7, 1974, Charleston Court granted Lower Platte an expanded 130-foot-wide easement, describing it as extending "sixty five (65') Feet each side of" a specified centerline, in order that Lower Platte might "construct, reconstruct, maintain and operate a drainage channel and necessary appurtenances thereto," and giving Lower Platte the right of ingress and egress. Because the

document describing this expanded Charleston Court easement was never acknowledged, it was not recorded until April 12, 1984, when Lower Platte's then general manager, Glenn D. Johnson, executed and recorded an affidavit reciting that the Charleston Court easement, which was attached to his affidavit, had been delivered to Lower Platte on or about January 7, 1974.

According to Johnson, Lower Platte considered itself to possess a 130-foot-wide easement when it widened the channel. However, the construction drawings indicate that the drainage channel itself was designed to be only 59 feet on either side of the centerline specified in the Charleston Court easement, or a total of 118 feet in width. Johnson noted that the channel as built varies in width and that the 130-foot easement the construction plans contemplated "is broader than the drainage channel itself and covers an additional 5 to 10 feet on either side of the actual drainage channel [which] is necessary for access to and from the drainage canal for the purpose of inspection, repair and maintenance . . . ." Johnson also testified that Lower Platte inspected the drainage channel and "performed weed, grass and tree control on the easement area" on an annual basis.

The servient tract underwent several changes of ownership until First Savings Company of Lincoln acquired it by sheriff's deed pursuant to a mortgage foreclosure for a stated consideration of $350,000. That deed was recorded on April 11, 1980. "Pursuant to Articles of Merger," First Savings then transferred ownership of the tract by a corporation warranty deed recorded October 13, 1983, to First National Lincoln Corporation, which subsequently became known as FirsTier, Inc. All further references to First National Lincoln Corporation shall be by the designation FirsTier, whether the reference relates to events occurring before or after the name change.

Before transferring title to FirsTier, First Savings, on August 1, 1980, applied to the city of Lincoln for a permit to subdivide the tract. On September 11, 1980, Lower Platte wrote a letter to the Lincoln City-Lancaster County Planning Department, asking that Lower Platte be granted a 130-foot-wide easement across the tract "for channel construction operation and

maintenance purposes on Dead Man's Run at that location" prior to approving First Savings' application for subdivision of the tract. The letter also stated that Lower Platte's "bank stabilization construction in that area has been based on having a 130' easement."

On September 25, 1980, Lower Platte unsuccessfully sought a 130-foot easement across the tract from First Savings. Lower Platte's like request of FirsTier on April 6, 1984, met the same fate.

On February 24, 1987, FirsTier transferred the tract to Kimco by corporation warranty deed recorded March 27, 1987. FirsTier also assigned to Kimco its rights in this then pending action against Lower Platte. Sometime before purchasing the tract, Kimco apparently applied for a building permit to construct carwashes along both sides of Dead Man's Run. On January 24, 1986, Lower Platte wrote a letter to Kimco's president, stating that a cross section of 60 feet on either side of the centerline of the channel was "necessary to provide the required capacity within the channel for flood flows," and this time asked for a 120-foot-wide easement.

A vice president of FirsTier testified that at the time it acquired the tract, neither it nor First Savings was aware that Lower Platte claimed an easement greater than 88 feet wide, as described in the then record. Thus, Kimco claims that it, as the assignee of FirsTier, is entitled to damages for the 42 feet by which the easement Lower Platte actually exercises exceeds the easement of record.

Neb. Rev. Stat. § 2-3234 (Reissue 1987) grants Lower Platte the power of eminent domain. It has been held that where the holder of an easement across property has the power of eminent domain for the use involved, an action for inverse condemnation is an appropriate remedy for a subsequent bona fide purchaser of the property who purchased without notice of the preexisting interest in land. *Industrial Disposal v. City of East Chicago*, 407 N.E.2d 1203 (Ind. App. 1980); *Cox Enterprises, Ltd. v. Phillips Petro. Co.*, 550 P.2d 1324 (Okla. 1976); *Pettis v. General Tel. Co.*, 66 Cal. 2d 503, 426 P.2d 884, 58 Cal. Rptr. 316 (1967); *State v. Anderson*, 241 Ind. 184, 170 N.E.2d 812 (1960). As stated in *Krambeck v. City of Gretna*,

198 Neb. 608, 614, 254 N.W.2d 691, 695 (1977),

> Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the property taken, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken.

We have held that deeds and other instruments required to be recorded are void as to subsequent bona fide purchasers for value without notice whose deeds or other instruments are first recorded. *Miller v. McMillen*, 214 Neb. 244, 333 N.W.2d 887 (1983); *Ames v. Miller*, 65 Neb. 204, 91 N.W. 250 (1902); Neb. Rev. Stat. § 76-238 (Reissue 1986). Easements are interests in real estate which, to constitute constructive notice to third parties, must be recorded under Neb. Rev. Stat. § 76-211 (Reissue 1986). See *Darsaklis v. Schildt*, 218 Neb. 605, 358 N.W.2d 186 (1984). Thus, Kimco has invoked a proper theory of recovery if it has established a cause of action which is not time barred.

This brings us to the first summarized assignment of error, the district court's conclusion that any cause of action which Kimco may have had is barred by the passage of time.

The district court's conclusion that the period of limitations for inverse condemnation actions is the 10 years within which actions for adverse possession must be brought pursuant to Neb. Rev. Stat. § 25-202 (Reissue 1985) is correct. *Krambeck v. City of Gretna, supra.* However, the district court's conclusion that Lower Platte obtained a prescriptive right in an easement 130 feet wide by adversely possessing the easement for a period in excess of 10 years is incorrect.

A party claiming a prescriptive easement must show that its use was exclusive, adverse, under claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period; if the use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. This rule is not affected by transfer of either the licensee's or licensor's title. *McCaslin v. Meysenburg*, 228 Neb.

748, 424 N.W.2d 331 (1988); *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984). Here, Lower Platte's expanded easement began permissively, and the use was later confirmed by the unrecorded easement. See *McCaslin v. Meysenburg, supra*, holding that the use of a strip of land pursuant to an unrecorded easement amounts to a permissive use, preventing acquisition of title by adverse possession. At no point did Lower Platte provide FirsTier or Kimco with notice that it claimed an expanded 130-foot easement as a matter of right. Quite the opposite, Lower Platte persistently requested that it be granted a wider easement than that of record.

Because Lower Platte's use of the expanded portion of the easement on August 3, 1973, began permissively, Lower Platte could not acquire title to that portion by adverse possession. Thus, the district court's conclusion that Kimco's action is time barred is erroneous.

This brings us to the remaining summarized assignment of error, that the district court erred in concluding that in any event, Kimco failed to establish a cause of action.

Kimco's premise is that it is entitled to damages because its seller and assignor, FirsTier, acquired the tract with notice of only an 88-foot easement and without notice of the unrecorded easement between Charleston Court and Lower Platte. As a general rule, a cause of action is assignable if the action would, on the death of the assignor, survive to the decedent's legal representative. *Forbes v. City of Omaha*, 79 Neb. 6, 112 N.W. 326 (1907). Since under Neb. Rev. Stat. § 25-1401 (Reissue 1985) a cause of action for injury to real estate survives the death of the person entitled to sue, we conclude that actions seeking compensation for the taking of property by the government are assignable. See, *P. C. Monday T. Co. v. Milwaukee Co. E. Comm.*, 24 Wis. 2d 107, 128 N.W.2d 631 (1964), holding appeal of condemnation award assignable; *Florida Power Corporation v. McNeely*, 125 So. 2d 311 (Fla. App. 1960); *State Road Department v. Bender, et al.*, 147 Fla. 15, 2 So. 2d 298 (1941). Thus, as FirsTier's assignee, Kimco acquired all the rights, and only the rights, of FirsTier in this action. *Mid-America Appliance Corp. v. Federated Finance Co.*, 172 Neb. 270, 109 N.W.2d 381 (1961).

Under our law, instruments which may be but are not recorded are void as to subsequent bona fide purchasers who record first. § 76-238. See *Mader v. Kallos*, 219 Neb. 579, 365 N.W.2d 408 (1985). A bona fide purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. *Mader v. Kallos, supra*. Therefore, in order to recover damages, Kimco was required to establish that FirsTier purchased for value and without notice, actual or constructive, of the expanded easement, and recorded its interest first. *Id.*

The evidence is that Kimco's assignor acquired the tract upon merging with First Savings, which had paid a consideration of $350,000. Clearly, when two or more corporations effect a merger or consolidation, the

> surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises . . . of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account . . . *and all other choses in action*, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(Emphasis supplied.) Neb. Rev. Stat. § 21-2075(4) (Reissue 1987). "[A]ny claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place . . . ." § 21-2075(5). Thus, the cause of action of a corporation survives the corporation's merger into or consolidation with another corporation and becomes vested in the surviving or new corporation. See, *D.D.J. Elec. Contractors v. Nanfito & Sons*, 40 Conn. Supp. 50, 479 A.2d 1250 (1984); *North American Land Corp. v. Boutte*, 604 S.W.2d 245 (Tex. Civ. App. 1980); *Duffy v. Cross Country Inds.*, 57 A.D.2d 1063, 395 N.Y.S.2d 852 (1977); *Platt Corp. v. Platt*, 21 A.D.2d 116, 249 N.Y.S.2d

75 (1964), *aff'd* 15 N.Y.2d 705, 204 N.E.2d 495, 256 N.Y.S.2d 335 (1965).

First Savings clearly recorded its interest in the tract before April 12, 1984, when Lower Platte filed the affidavit with the attached, unacknowledged easement. We therefore need not, and do not, consider whether the recorded affidavit provides constructive notice of the unacknowledged easement to subsequent purchasers.

As Kimco stands in the shoes of FirsTier, Kimco purchased the tract for value, without actual or record notice of any expanded easement, and recorded its interest first. The inquiry, however, cannot end with that observation, for a purchaser is charged with notice of an easement, the evidence of which is apparent from the inspection of the premises. *Wilbur v. Schweitzer Excavating Co.*, 181 Neb. 317, 148 N.W.2d 192 (1967). Stated another way, one who purchases land burdened with an open, visible easement is ordinarily charged with notice that he or she is purchasing a servient estate. *Johnson v. Mays*, 216 Neb. 890, 346 N.W.2d 401 (1984); *Magnuson v. Coburn*, 154 Neb. 24, 46 N.W.2d 775 (1951).

The question before us resolves into whether the record is such that any phase of this matter is appropriately resolved by summary judgment. Although we have said that the denial of a motion for summary judgment is not a final order and thus not appealable, *Carnes v. Schram, ante* p. 282, 440 N.W.2d 451 (1989), and *Bryant Heating v. United States Nat. Bank,* 216 Neb. 107, 342 N.W.2d 191 (1983), we have also held that when both parties move for summary judgment and the district court sustains one of the motions, the Supreme Court obtains jurisdiction over both motions and can determine the controversy, making an order specifying the facts that appear without substantial controversy and directing such further proceedings as it deems just. *Randall v. Erdman*, 194 Neb. 390, 231 N.W.2d 689 (1975). As has often been noted, summary judgment is appropriate only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of

law. *Carnes v. Schram, supra*; *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989); *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989); Neb. Rev. Stat. § 25-1332 (Reissue 1985).

While the record makes clear that Kimco is not charged with record notice of the full easement Lower Platte exercises across Kimco's tract, the record establishes neither what easement Lower Platte actually exercises nor what an inspection of the tract reveals about Lower Platte's easement. The undisclosed extent of the easement actually exercised by Lower Platte and the undemonstrated result of an inspection of the tract present genuine issues concerning material facts. Thus, while Kimco has established a cause of action, it has not established that it is necessarily entitled to any damages.

Once it is determined that Kimco has established a cause of action which is not time barred, it cannot be said that Lower Platte is entitled to judgment as a matter of law.

Accordingly, the district court's judgment denying Kimco's motion for a limited summary judgment is affirmed; the district court's judgment granting Lower Platte a summary judgment and dismissing Kimco's petition is reversed. The cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BETTY J. OLSEN, APPELLANT, V. FRANCIS L. RICHARDS, M.D., APPELLEE.

440 N.W.2d 463

Filed May 26, 1989. No. 87-1112.

Malpractice: Limitations of Actions. Any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

H. Titus Swan, of Anderson, Klein, Peterson and Swan, for appellant.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson & Wright, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

CAPORALE, J.

Plaintiff-appellant, Betty J. Olsen, seeks to recover for injuries sustained while visiting her physician, defendant-appellee, Francis L. Richards. The district court sustained Richards' demurrer on the ground Olsen's cause is time barred and, after Olsen refused to plead further, dismissed the action. Olsen assigns the dismissal of her action as error. We affirm.

Olsen's petition was filed on May 22, 1987, and avers that on May 26, 1983, she went to Richards' office "for a scheduled examination and sinus treatment"; that Richards seated her "in a large antique chair consisting of a double-wide steel headrest on top"; and that "[p]rior to the examination and treatment . . . Richards situated his hands on the headrest and suddenly and forcefully slammed the headrest down" on Olsen's neck, thereby "causing severe pain and damage to the back of [Olsen's] neck."

The sole issue is whether, as Olsen contends, the 4-year statute of limitations relating to ordinary negligence, Neb. Rev. Stat. § 25-207 (Reissue 1985), applies or whether, as Richards urges, either the 2-year malpractice statute of limitations, Neb. Rev. Stat. § 25-208 (Reissue 1985), or the 2-year professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1985), controls. Obviously, if the ordinary negligence statute of limitations governs, Olsen's action is not time barred; however, if either the malpractice or professional negligence statute of limitations covers the situation, Olsen's action is so barred.

Olsen's thesis is that her action is regulated by § 25-207

because she has alleged an act of "ordinary negligence." Richards' theory is that as the act of adjusting the examination chair was an integral part of his examination of Olsen as his patient and arose out of the same circumstances as any other act performed by a physician in the course of such an examination and treatment, one or the other of the shorter statutes of limitations rules the outcome.

In *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976), this court determined that an action, brought against a physician on a respondeat superior theory for the alleged negligent acts of his employee in performing a blood-typing test on the plaintiff, was governed by the statute of limitations relating to professional negligence rather than that relating to ordinary negligence. The determinative inquiry for the court was whether the employee was engaged in professional services. Quoting *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), we said:

> "A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. * * * In determining whether a particular act is of a professional nature or a 'professional service' *we must look not to the title or character of the party performing the act, but to the act itself*." . . . It is thus irrelevant, in determining whether [the employee] was performing a professional service at the time of the alleged negligence, to show what the title of her position with [the physician] was, or what her status was denominated. The court must look to the nature of the act itself and the circumstances under which it was performed.

(Emphasis in original.) *Swassing v. Baum* at 656, 240 N.W.2d at 27.

The *Swassing* court concluded:

> The performance of the blood test was an essential and integral part of the rendition of professional services by [the physician] to [the plaintiff]. When [the plaintiff] presented herself to [the physician] . . . for examination

> and diagnosis, a professional relationship, in this case, doctor-patient, was created. This professional relationship was the stimulus for the performance of the blood typing test on [the plaintiff], and the test and the interpretation of its results all occurred during the course of the professional relationship.

Id.

In *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964), this court determined that the 2-year malpractice statute of limitations, rather than the 4-year statute which governed fraud, applied to an action against a physician for fraudulently concealing the cause and nature of a patient's condition. All the statements and acts complained of occurred during the physician-patient relationship. We stated:

> We do not think that the advice and the statements of a physician as to the nature and cause of a patient's condition, as a part of the necessities of treating and consulting with the patient, are separable. *They are the essentials to the performance of the physician's whole duty to the patient.* We do not think that the Legislature, when it enacted the special limitation statute of 2 years on malpractice intended to separate certain portions of the whole physician-patient relationship and apply a confusing standard of 2 and 4 years to different portions of that relationship, or to require the courts to make such a nebulous and difficult fact separation and determination.

(Emphasis supplied.) *Id.* at 697, 131 N.W.2d at 165.

More recently, we have held that the professional negligence statute of limitations applies to a claim against a physician for misrepresentation of the effects of x-ray treatment for chronic asthma, saying, "[A]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is 'malpractice' and comes within the professional or malpractice statute of limitations." *Colton v. Dewey*, 212 Neb. 126, 131-32, 321 N.W.2d 913, 917 (1982). In *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987), we held that the malpractice statute of limitations, rather than that relating to battery, applied to a claim against a

physician for failure to obtain the patient's consent to medical treatment.

A similar fact situation to the present case was considered in *Stanley v. Lebetkin*, 123 A.D.2d 854, 507 N.Y.S.2d 468 (1986). There, the plaintiff fractured her ankle while alighting from the defendant physician's examining table. The New York court held that the plaintiff's action against the physician to recover damages for personal injury was one for malpractice, not simple negligence, and thus was governed by the malpractice statute of limitations. The court said:

> [The plaintiff's] allegations establish that the duty the defendant is charged with violating arose from the physician-patient relationship and was substantially related to his treatment of the plaintiff. Had the plaintiff not consulted the defendant in his capacity as a physician, there would have been no reason for her to be on his examining table in the first place. It was only his awareness of her complaints, acquired in the course of that relationship, when coupled with his knowledge as a physician, which would give rise to a duty to assist her on or off the table, or to keep her "under constant surveillance *in view of her complaints*" (emphasis supplied). Such acts, if negligent, constitute malpractice. . .
>
> . .

Id. at 855, 507 N.Y.S.2d at 469.

It can only be inferred from Olsen's averments that when the alleged act of negligence occurred, Richards was positioning Olsen for the purpose of rendering her a service in his role as her physician.

As in *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976), a physician-patient relationship existed between Richards and Olsen which was the stimulus for the examination, and the examination was an essential and integral part of the physician's rendition of professional services. As stated in *Stacey v. Pantano, supra*, when the Legislature enacted the special limitation statute of 2 years on malpractice, it did not intend to separate certain portions of the whole physician-patient relationship and apply a confusing standard of 2 and 4 years to different portions of that relationship, or to

require the courts to make such a nebulous and difficult fact separation and determination.

Thus, the 4-year ordinary negligence statute of limitations does not apply to the action Olsen has pled. Inasmuch as her action is time barred irrespective of which, if not both, of the two shorter statutes govern, we need not and therefore do not concern ourselves with the nicety of distinguishing between the spheres within which each of those statutes operates.

If a petition alleges a cause of action ostensibly barred by the statute of limitations and fails to allege some excuse tolling the operation and bar of the statute, the petition fails to allege sufficient facts to constitute a cause of action and is subject to a demurrer. *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989). Since Olsen pled no excuse tolling the operation of the relevant statute of limitations, the judgment of the district court is correct.

AFFIRMED.

KEITH D. REDFIELD, APPELLANT, V. DEBORAH S. REDFIELD, APPELLEE.
440 N.W.2d 242

Filed May 26, 1989. No. 88-436.

Appeal from the District Court for Hitchcock County: JOHN D. KNAPP, Judge. Affirmed.

John J. Battershell, of The Law Offices, for appellant.

Lance C. Antonson, of Hines & Hines Lawyers, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

PER CURIAM.

The petitioner, Keith D. Redfield, appeals from the order of the district court placing temporary legal custody of the children in the district court and placing physical custody and

possession of the children with the respondent, Deborah S. Redfield.

As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion. *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987).

We find no abuse of discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE W. PATTERSON, APPELLANT.
440 N.W.2d 242

Filed May 26, 1989. No. 88-577.

1. **Postconviction: Proof: Constitutional Law.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, which is available only when a constitutional right has been infringed or violated.
2. **Postconviction: Appeal and Error.** The findings of the district court on a motion for postconviction relief will not be disturbed unless clearly erroneous.
3. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** One defending a criminal charge has the constitutional right to the effective assistance of counsel.
4. **Postconviction: Effectiveness of Counsel: Proof.** When, in a postconviction motion, a defendant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area.
5. _____: _____: _____. On a motion for postconviction relief based on the ineffectiveness of counsel, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Barry Waid, Hall County Public Defender, for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

PER CURIAM.

Following a hearing, the district court overruled defendant-appellant Lee W. Patterson's motion for postconviction relief from the adjudication pursuant to a jury's verdict that he conspired to commit murder. Patterson's six assignments of error present but a single issue, Did the district court err in finding that he was not denied effective assistance of counsel at trial? We affirm.

Patterson was charged with first degree murder, a violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985), for killing Brian Crittenden on February 1, 1980. Attorneys engaged in the private practice of law in the community were appointed to represent Patterson, and in due course the case proceeded to trial. This trial featured two competing versions of the events of Crittenden's murder, one told by Michael McNitt, the other by Patterson.

According to McNitt, Patterson was a drug dealer, and Crittenden was his supplier. Crittenden would "front" drugs to Patterson, supplying Patterson with drugs and looking for payment later, after Patterson had made his sales. On "the day the incident took place," McNitt, his brother Phillip, Patterson, and Patterson's wife, Debra, were sharing a residence. Crittenden arrived at about 7 a.m., bringing 3 pounds of marijuana for Patterson. At the time, Patterson was asleep in an upstairs portion of the residence. McNitt invited Crittenden into his quarters in the basement, where the two smoked marijuana and snorted cocaine for some time. Crittenden then asked for a place to sleep, and McNitt allowed him to use a space in the basement.

After Crittenden had fallen asleep, McNitt went upstairs and was joined sometime thereafter by Patterson. When McNitt informed Patterson of Crittenden's presence in the basement with 3 pounds of marijuana, Patterson suggested that they "knock off" Crittenden and sell the marijuana to make rent money. Patterson explained that Crittenden had been pressuring him for money owed for past drug deliveries, and

"he really didn't like Brian all that much."

After some discussion, Patterson retrieved a .22-caliber rifle from his bedroom, went into the basement, turned back, talked with McNitt about his intentions again, returned to the basement, and shot Crittenden where he lay sleeping. Patterson then returned upstairs, replaced the rifle in his bedroom, and said to McNitt, "It's done." McNitt then went to the basement and found Crittenden in bed with blood in his mouth or nostrils. Later that day, Patterson emptied Crittenden's pockets and orchestrated disposal of the body, assisted by McNitt and McNitt's brother.

According to Patterson's version of events, McNitt woke him on the morning of Crittenden's death to inform him of Crittenden's arrival. Patterson went to the basement, found Crittenden asleep, and woke him. The two then discussed selling Crittenden's 3 pounds of marijuana and whether this could be accomplished "before 6 or 7 o'clock that night." Later, according to Patterson, McNitt suggested that they shoot Crittenden. Some time later, McNitt took Patterson's rifle and shot Crittenden as he slept. Thereafter, according to Patterson, McNitt took the lead in disposing of Crittenden's body, with Patterson and McNitt's brother assisting.

Debra Patterson gave testimony that tended to corroborate her husband's version of the events. McNitt's brother invoked the protection of the fifth amendment, refusing to testify at trial.

The jury was told that pursuant to a plea bargain, McNitt was charged with conspiracy to commit murder.

Although a verbatim record of the instruction conference is not included in either the bill of exceptions in this case or the bill of exceptions in the underlying trial, *State v. Patterson*, case No. 44003, the transcript in this case reflects that an instruction in the form commonly referred to as a "step instruction" was given verbatim, as requested by Patterson's trial attorneys. This instruction charged the jury to first determine whether Patterson was guilty of first degree murder; if it found he was not, then the jury was to consider the lesser-included offense of second degree murder. If the jury concluded Patterson was not guilty of second degree murder, the jury was next to consider

whether he was guilty of the lesser-included offense of conspiracy to commit murder. If the jury found that he was not guilty of conspiracy to commit murder, the jury was finally to consider whether he was guilty of manslaughter, returning a verdict of guilty to that charge or of not guilty. The jury returned a verdict of guilty of conspiracy to commit murder, whereupon Patterson was so adjudged and thereafter sentenced to imprisonment for a term of 16 years 8 months to 50 years.

Following conviction, Patterson moved for dismissal of his trial attorneys and appointment of substitute counsel to pursue his appeal. This motion was denied, and Patterson was represented on direct appeal by the same attorneys who handled his trial. Patterson's direct appeal challenged only the propriety of his sentence, which this court affirmed under then Neb. Ct. R. of Prac. 20 (rev. 1977), 209 Neb. xx (case No. 44003, Sept. 16, 1981).

Subsequently, Patterson, now represented by the office of the Hall County public defender, filed the subject motion for postconviction relief. By the time of the hearing thereon, one of Patterson's two appointed trial attorneys had died. The remaining trial attorney testified as follows:

> Q. Did you make the decision to include the lesser included offense of conspiracy to commit murder in the jury instruction prior to the trial commencing?
>
> [Attorney]. If you'll bear with me I have to make some qualifications. I, obviously, was not lead counsel in that case so they weren't really my decisions to make; although, I understand my professional responsibilities that I'm as responsible as lead counsel. The decision was probably made by [lead counsel]. I'm not sure when he precisely made that decision. I am confident that it is something that he had contemplated for weeks before trial because of—you know, basically, what I was indicating earlier, the whole purpose of having Mr. Patterson testify was to give some options to the jury. And obviously the way to give the options to the jury is to provide them with the court's instruction for some other lesser offense.

A defendant seeking postconviction relief has the burden of establishing a basis for such relief, which is available only when

a constitutional right has been infringed or violated. The findings of the district court will not be disturbed unless clearly erroneous. *State v. Gagliano,* 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Ellefson,* 231 Neb. 120, 435 N.W.2d 653 (1989).

It is axiomatic that one defending a criminal charge has the constitutional right to the effective assistance of counsel. *State v. Ellefson, supra*; *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989). When, in a postconviction motion, a defendant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions. *State v. Gagliano, supra*; *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989). These are questions of law, not of fact. *State v. Gagliano, supra.*

Patterson contends that his trial counsel rendered prejudicially ineffective assistance in securing a jury instruction on conspiracy to commit murder. Although it may be, as Patterson argues, that conspiracy to commit murder is not a lesser-included offense of murder in the first degree and that he thus was not entitled to an instruction on conspiracy to commit murder, it is nevertheless also true that ineffective assistance of counsel is not synonymous with error by counsel. Although Patterson's trial counsel may have been in error in their belief that Patterson was entitled to a conspiracy instruction, we cannot say that under the circumstances of this case the request for such an instruction constituted ineffective assistance.

As Patterson's counsel correctly noted, Patterson faced evidence which, if believed by the jury, would make him guilty of first degree murder and thus make him a candidate for the death penalty. Trial counsel, without benefit of hindsight, reasonably concluded that the best strategy was "to give some options to the jury" by directing its attention from the crime with which Patterson was charged to a crime no more onerous than that with which McNitt was charged. Given the situation Patterson faced, this strategy cannot be said to have constituted

ineffective assistance of counsel.

AFFIRMED.

CAPORALE, J., dissenting.

I must respectfully dissent, for, in arriving at its resolution of Patterson's appeal, the majority indulges an underdeveloped analysis, thereby reaching a legally incorrect conclusion.

It is to be remembered that the information which charged Patterson with one count of first degree murder, in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985), was never thereafter amended to reflect additional charges. The majority correctly observes that Patterson was convicted under a so-called step instruction requested by his trial counsel, which instruction included the "option" of a finding of guilty to conspiracy to commit murder. As shall be seen, the true significance of this observation has eluded the majority.

Patterson argues, in sum, that his trial counsel rendered prejudicially ineffective assistance in securing a jury instruction concerning a crime with which he was not charged. This instruction was apparently requested on the misjudgment that conspiracy to commit murder is a lesser-included offense of murder in the first degree and therefore need not have been separately charged. See, *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986).

A lesser-included offense is one which is necessarily established by proof of the greater offense. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989); *State v. Baker*, 231 Neb. 144, 435 N.W.2d 202 (1989). To be a lesser-included offense, the elements of the crime must be such that in committing the greater offense, one at the same time necessarily commits the lesser offense. *State v. Olsan, supra*; *State v. Baker, supra*.

The determination of whether an offense is a lesser-included one is controlled by the elements of the crimes as set forth in the statutes and not by the facts presented in the particular case at issue. *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 186 (1989). The fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient

to invoke the lesser-included offense instruction if it is possible to commit the greater offense without committing the lesser offense. *State v. Donhauser, supra.*

Section 28-303 establishes the elements of the crime of murder in the first degree as follows:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person.

Neb. Rev. Stat. § 28-202 (Reissue 1985) enumerates the elements of conspiracy thusly:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

It is abundantly clear, therefore, that one may kill another with the mental state, attendant circumstances, or in the manner proscribed by § 28-303 without conspiring with another to do so. Similarly, one may conspire with another to commit a killing which, if consummated, might itself rise to the level of first degree murder; even in the absence of the consummation of such a killing, however, such an agreement plus an overt act in furtherance of the killing would be sufficient to make out the crime of conspiracy described in § 28-202. Obviously, then, conspiracy to commit murder is not a lesser-included offense subsumed within the statutory definition of murder in the first degree, nor is murder in the first degree a lesser-included offense subsumed within the

statutory definition of conspiracy to commit murder. Thus, there can be no question but that the questioned portion of the instruction at issue is without legal basis.

It is equally clear that the foregoing is not an esoteric analysis. The rules regarding lesser-included offenses in Nebraska were in existence at the time of Patterson's trial and remain substantially unchanged today. See, e.g., *State v. Tamburano*, 201 Neb. 703, 705, 271 N.W.2d 472, 474 (1978) ("A lesser offense is one which must be committed if the greater offense is committed or, put slightly different[ly], is one which is fully embraced in the higher offense"); *State v. Comer*, 199 Neb. 762, 763, 261 N.W.2d 374, 375 (1978) ("A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged").

A lawyer with ordinary training and skill in the criminal law in Nebraska would understand that conspiracy to commit murder is not a lesser offense included within a charge of murder in the first degree. Patterson has thus satisfied the first element of the test for demonstrating the ineffective assistance of trial counsel. See, *State v. Gagliano,* 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Neal,* 231 Neb. 415, 436 N.W.2d 514 (1989).

To prevail, however, Patterson must also show a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome of the trial below, that he was prejudiced by his trial attorneys' erroneous request. *State v. Gagliano, supra*; *State v. Englehart*, 231 Neb. 579, 437 N.W.2d 468 (1989); *State v. Neal, supra*; *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989).

The majority's assumption that Patterson was not prejudiced by the erroneous portion of the questioned instruction proceeds from the notion that but for the opportunity to find Patterson guilty of conspiracy to commit murder, the jury would have found him guilty of the more onerous crime of murder in one degree or another.

This divination overlooks that the instruction at issue directed the jury to determine whether Patterson conspired to commit murder if, and only if, it first concluded that he was not

guilty of murder in either the first or second degree. The only relevant assumption the law permits is that the jury followed the court's instruction. *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985); *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982). Thus, the verdict means that the jury accepted Patterson's version of the killing rather than McNitt's rendition of the events. It is tautological to observe that Patterson would not have been convicted of conspiracy had the jury not been erroneously instructed as it was at the ill-informed and unskilled request of his trial attorneys. All confidence in the outcome of Patterson's trial is undermined by this simple observation.

The State suggests, however, that in any event Patterson's withdrawal of his motion for new trial, in which motion the State had joined and which was in part based on "error of law occurring at trial," waived any ineffectiveness his trial attorneys may have demonstrated by requesting the subject instruction. The postconviction evidence establishes that Patterson withdrew his motion upon being advised by his trial attorneys that should he succeed in obtaining a new trial, he would again "face the charge of first degree murder."

Both the Nebraska and U.S. Constitutions provide that no person shall be twice put in jeopardy for the same offense. U.S. Const. amend. V; Neb. Const. art. I, § 12; *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), petitioner had been charged with first degree murder, had been convicted by a jury of second degree murder as a lesser-included offense, and had successfully appealed that conviction. He was then again placed on trial for first degree murder and this time convicted of that crime. Deciding Green's appeal from the second conviction, a majority of the U.S. Supreme Court held that "this second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution." 355 U.S. at 190. The *Green* majority intimated that this result rested on the observations that "the jury's verdict [was] an implicit acquittal on the charge of first degree murder" and that the jury

> was given a full opportunity to return a verdict and no

> extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

355 U.S. at 190-91.

Some years later, in *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970),

> Petitioner was charged with the killing of Johnnie Mae Dupree in an indictment for the offense of murder filed in the Superior Court of Effingham County, Georgia. He entered a plea of not guilty and was tried on October 17, 1962. The jury returned a verdict of guilty to the lesser included crime of voluntary manslaughter and fixed the sentence at 10 to 15 years in the state penitentiary. The jury's verdict made no reference to the charge of murder.
>
> The Court of Appeals of Georgia reversed the conviction because of an erroneous jury instruction and ordered a new trial.

398 U.S. at 324. In a unanimous decision the U.S. Supreme Court reasoned:

> "The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . . ." (Emphasis added.) The "twice put in jeopardy" language of the Constitution thus relates to a potential, *i. e.*, the risk that an accused for a second time will be convicted of the "same offense" for which he was initially tried.

398 U.S. at 326 (quoting *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)). Citing *Kepner v. United States*, 195 U.S. 100, 24 S. Ct. 797, 49 L. Ed. 114 (1904), and *Green v. United States, supra*, the *Price* Court held that "[t]he rationale of the *Green* holding applies here," 398 U.S. at 329, and reversed Price's conviction obtained at his second trial. Of particular interest to the case before us is the *Price* Court's observation that the result in *Green, supra*,

> rested on two premises. First, the Court considered the

> first jury's verdict of guilty on the second-degree murder charge to be an "implicit acquittal" on the charge of first-degree murder. Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury "was given a full opportunity to return a verdict" on that charge and instead reached a verdict on the lesser charge.

398 U.S. at 328-29.

As noted earlier, the jury in this case was explicitly instructed to consider Patterson's culpability on the charges of first and second degree murder before considering the erroneously included conspiracy offense. The jury's verdict thus embodied its certain conclusion that Patterson was not guilty of the former two crimes. Jeopardy having attached and having been resolved in his favor on those crimes, Patterson could not again have been tried for first or second degree murder in the death of Brian Crittenden.

Consequently, the advice relative to Patterson's motion for new trial constitutes not a basis for ruling that he waived his trial attorneys' ineffectiveness in seeking an erroneous instruction, as contended by the State, but, rather, constitutes a separate ground for finding those attorneys ineffective.

The State also urges the view that a criminal defendant may not complain of error he himself or she herself invited. This maxim is indeed meritorious in many contexts. See, e.g., *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), *overruled on other grounds*, *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987); *State v. Blue*, 223 Neb. 379, 391 N.W.2d 102 (1986); *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975). However, it is not applicable in all contexts. See, e.g., *State v. Williams*, 212 Neb. 860, 326 N.W.2d 678 (1982); *State v. Svoboda*, 205 Neb. 175, 287 N.W.2d 41 (1980). It cannot be applicable where a convicted defendant appeals or requests postconviction relief based upon ineffective assistance of counsel. Patterson, it must be remembered, here assigns no error directly to the district court's instruction to the jury but, rather, challenges his attorneys' action in requesting such an instruction. In such a situation, the presumption that the interests of attorney and client are one and the same can no

longer be uncritically indulged, and courts are obliged to inquire whether the attorney was derelict in the duty to zealously defend the client within the bounds of the law, or to advise the client such that any resulting error "invited" by the client clearly resulted from the client's free exercise of independent and fully informed choice. See, generally, *People v. Berryman,* 171 Ill. App. 3d 548, 559, 526 N.E.2d 180, 187 (1988) ("Because defendant has not alleged that his trial counsel was ineffective for submitting this instruction, we believe that he is estopped from having us consider the issue"); *State v. Thomas*, 53 Or. App. 375, 631 P.2d 1387, 1391 (1981) ("It may be that counsel discussed the entire situation with defendant . . . and that defendant participated in the tactical decision . . . . The decision may have been a calculated risk . . . in which defendant participated. *If that is the case, he cannot now complain*"). (Emphasis supplied.) But see, *State v. Taylor*, 30 Ohio App. 2d 252, 285 N.E.2d 89 (1972).

On the facts of this case as adduced at the postconviction motion hearing, it is apparent that any error by Patterson's trial attorneys in requesting an instruction on a crime with which Patterson was not charged may not properly be imputed to Patterson himself, for he was either mere spectator and not participant in the strategic decision at issue, or relied on the advice of his attorneys.

For the foregoing reasons, I am compelled to conclude that the judgment of the district court is incorrect and should be reversed. I would so hold.

IN RE APPLICATIONS T-61 AND T-62 AND APPROPRIATIONS D-785 AND D-795 OF THE BLUE CREEK IRRIGATION DISTRICT. BLUE CREEK IRRIGATION DISTRICT, APPELLANT, V. J. MICHAEL JESS, DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES, STATE OF NEBRASKA, ET AL., APPELLEES.

440 N.W.2d 466

Filed May 26, 1989. No. 88-666.

1. **Administrative Law: Waters: Appeal and Error.** Upon appeal to the Supreme Court, an order of the director of the Department of Water Resources is reviewed for errors appearing in the record and to determine whether the judgment conforms to law, is supported by relevant evidence, and is not arbitrary, capricious, or unreasonable.
2. **Waters.** A water appropriation that has not been used for a beneficial or useful purpose for more than 3 consecutive years ceases to exist and is subject to cancellation. Neb. Rev. Stat. § 46-229 (Reissue 1988).
3. _____. The procedure set out in Neb. Rev. Stat. § 46-229.04 (Reissue 1988) for cancellation of water rights for nonuse is not exclusive.
4. **Waters: Evidence.** Under Neb. Rev. Stat. § 46-229.04 (Reissue 1988), the verified field investigation report of an employee of the Department of Water Resources may be received as prima facie evidence for forfeiture and annulment of an appropriation.
5. **Waters: Words and Phrases.** Beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation.
6. **Waters.** Applications to transfer the use of a water appropriation must be made by the person owning the permit to appropriate.
7. _____. In considering an application for a transfer of water rights, the director is to consider whether the change of location will diminish the supply of water otherwise available and whether the requested change is in the public interest.

Appeal from the Department of Water Resources. Affirmed.

Jess C. Nielsen, of Nielsen & Birch, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee director.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

Blue Creek Irrigation District (District) has appealed from the order of the director of the Department of Water Resources

denying applications T-61 and T-62 filed by the District requesting transfers of water rights under appropriations D-785 and D-795. The order also canceled a part of the appropriation D-785.

Blue Creek is a stream that originates in Garden County, Nebraska, and flows generally from north to south until it flows into the North Platte River just west of Lewellen, Nebraska. Water appropriations D-785 and D-795, which are owned by the District, have priority dates of December 27, 1893, and September 27, 1894. Both are permits to divert water from Blue Creek into the Blue Creek Canal system for irrigation. The headgate is located in the northwest quarter of the southwest quarter of Section 33, Township 17 North, Range 42 West of the 6th P.M., in Garden County, Nebraska.

The applications were filed on February 24, 1988. The notice of hearing, which was dated March 4, 1988, stated department records indicated that a part of the land had not been irrigated for more than 3 consecutive years and that the hearing would be to determine whether the applications should be approved and whether part of the appropriations should be canceled because of nonuse.

The land which is involved in this proceeding is located in Sections 8 and 17 in Township 16 North, Range 42 West of the 6th P.M., in Garden County, Nebraska. Appropriation D-785, which has the earlier priority, is referred to in the record as the "original filing." Appropriation D-795 is referred to as the "Winters filing."

Application T-62 sought to transfer 1 cubic foot per second of water from 71 acres of land located in the east half of Section 17 under the original appropriation, D-785, to 71 acres of land in the east half of the northwest quarter of Section 17, which is under the Winters appropriation, D-795. Steve Cochran, the president of the District, is the owner of the land described in application T-62. In his testimony he described the purpose of the transfer as follows:

> A. Well, I have 95 acres underneath the original filing which is located in the east half of Section 17-16-42 and I have 68 acres of Winters filing located in the east half of the — the east half of the west half of 17-16-42, and right

now I'm irrigating the original filing or a portion thereof with center pivot irrigation and usually sometime between a five and the ten, the fifth — and the 15 of July why Winters filing is withdrawn from the ditch due to over appropriation. So I'm trying to move original filing over to the Winters filing so that there is no problem on irrigating the flood crops on that.

. . . .

Q. Okay. Now then, where is the Winters filing land shown on this map or is it shown on Exhibit 3?

A. Well, the Winters filing is the 68 acres that is now shown on this map as 71 acres. I wanted to add three acres to it because during the survey of '84 why three acres of my trees were left out, you know, that were watered yearly and somehow something happened that they were, you know, left out. I want them put back in.

Q. Now, is it my understanding that the 71 acres are acres that are not now a part of either filing; is that correct?

A. No.

Q. They were eliminated?

A. No. No.

Q. All right.

A. The 71 acres is now the 68 acres that is underneath the Winters filing.

Q. Okay. And so you're willing to transfer land from the original filing to the Winters filing?

A. Correct.

Application T-61 sought to transfer .97 cubic feet per second of water from the 68 acres of land in the east half of the northwest quarter of Section 17, which is under the Winters appropriation, to a 7-acre tract located in the southwest corner of the southeast quarter of Section 8, which is owned by Daryn D. Mapel, and to 61 acres of land located in the southwest quarter of Section 8, which is owned by Burdette H. Pickard. Cochran explained the purpose of this transfer as follows:

Q. We want to talk about item 61.

A. Okay. There was 68 acres of Winters filing on Section 17 that I'm attempting to transfer to Section 8.

. . . .

Q. (By Mr. Nielsen) Now, do you own the land in the — that's identified as 61 and the 7?

A. No.

Q. Who owns that land?

A. Seven acres belong to Daryn Maple who lives at Goleta, California, and which was originally underneath the Blue Creek Irrigation District that was deleted in '76 or '77 because of non water use.

Q. Uh-huh.

A. And the 61 acres are located above the Blue Creek Irrigation District which are are [sic] now watered by pump irrigation, and we were just trying to leave it in the district.

Q. So then how would you water the 61 acres out of the canal?

A. Well, that belongs to Mr. Pickard and that would be watered by pump and pipeline.

Q. All right.

MR. LAMBERSON: You're talking irrigation by pump from the canal or irrigation by pump from a well?

THE WITNESS: It is now watered by pump from a well.

MR. LAMBERSON: Okay.

THE WITNESS: But it would be watered from pump by the irrigation canal.

An objection to the applications was filed by the Paisley Irrigation District, which has an appropriation to divert water from Blue Creek that is junior to those of the District.

The hearing was held on April 20, 1988. The applicant's motion to bifurcate the hearing was sustained so that the evidence relating to the applications to transfer was heard before the evidence as to nonuse.

Cochran testified that he was trying to get the original filing moved over to the Winters filing because the Winters filing is withdrawn from the ditch about every July 15 because Blue Creek is over appropriated and the District is not able to divert as much water as its appropriations authorize. By the 5th or 10th of July, the prior filings take their full appropriations, and

the creek runs dry. He testified that the District does not get any partial use of water when the creek runs dry and is allowed only to divert or not divert. Cochran concluded that the proposed transfer would not increase the amount of water diverted from Blue Creek. He stated that the Hooper district and the Union district have appropriations with priority over the District's appropriations. Neither Union nor Hooper objected to the applications for transfer. Cochran was not aware of any riparian water user who objected to the transfer applications. He testified that the source of the water would be the same—from the Blue Creek basin.

Cochran further testified that he has an irrigation well in the southeast quarter of Section 17 and that the land from which he wanted to transfer the water rights was irrigated by this well through a center pivot sprinkler system. His other center pivot is located in the northeast quarter of Section 17. He claims this area was irrigated from the canal on the surface in 1985. He testified that he cut two openings in the ditch, that the water flowed to the land for 6 to 8 hours from one opening, and that the other ran about 2 to 3 hours. He was experimenting to see if he could get a better crop by using more water and decided it would be helpful, but the sandy soil conditions would make it difficult to flood irrigate. Cochran testified that he told Thomas Hayden from the Department of Water Resources that the land had not been irrigated from the creek since 1975, but thought that Hayden was asking about active, yearly irrigation.

Pickard testified that the 61 acres of land in the southwest quarter of Section 8 could be irrigated by gravity irrigation from his wells. Although not a director of the District, he testified that he supported the application for transfer and that he did not think any other riparian water user would be affected by the proposed transfers.

Donald Fischer and Richard Fischer testified that if the transfers were granted, land that had not previously been watered out of Blue Creek would be watered and the water supply of the Paisley Irrigation District would be diminished. They testified that waste water from any District irrigation could not run back into the canal for use by Paisley.

Hayden, a water specialist for the Department of Water

Resources, testified that he had made a report of his field inspection with regard to the transfer applications in this case. Hayden met Cochran at his farm on March 1, 1988, and inspected the land to see if there was a canal and to find out how Cochran would apply the water to the land. Hayden testified that Cochran said that he had not irrigated the land from the canal except for 9.5 acres in the northeast quarter in 1985. Cochran and Hayden inspected the land which was subject to transfer, and there was a center pivot irrigation system on the land. Hayden then prepared exhibits 6 and 7 based on what Cochran told him and on Hayden's own observations. After the inspection, Cochran called Hayden and wanted to change the field report.

Hayden's report relating to application T-62 states:

> Of the following land mentioned above only 9.5 acres located in the NE¼NE¼ and the NE¼SE¼NE¼ of Sec. 17 have been irrigated during the last three years from water out of the Blue Creek Canal. This land is flat and close to the Blue Creek Canal. The remainder of the land mentioned above covered in this investigation is all irrigated by two center pivots with water from a groundwater well.
>
> Mr. Cochran told me in 1985 he irrigated 9.5 acres located in the NE¼NE¼ and the NE¼SE¼NE¼ of Sec. 17 from water out of the Blue Creek Canal. Mr. Cochran said the remainder of the land covered in this report mentioned above has not been irrigated from water out of the Blue Creek Canal since 1979. He said the reason being the two center pivots. Mr. Cochran said it is his opinion, with the new law LB198, Incidental and Intentional Underground Water Storage, he is irrigating this land with water from the Blue Creek Canal.

Exhibit 7, relating to application T-61, states:

> The land is all gravity irrigated. The water is delivered to this land through a 15 inch underground pipe, which is attached to a turnout from the Blue Creek Canal, located in the bottom of Sec. 8, Twp. 16, Rge. 42.
>
> Mr. Cochran told me he irrigated all the land in the E½NW¼ of Sec. 17 last irrigation season with water out

> of the Blue Creek Canal. Mr. Cochran said he put the underground pipe in that delivers water from the Blue Creek Canal to this land, so if water was not available from the canal he could pump ground water into it.
>
> . . . .
>
> In conclusion, from my visual observations, I can say all the land in the E1/2NW1/4 of Sec. 17 was irrigated with water out of the Blue Creek Canal last irrigation season.

The hearing officer took judicial notice of the record of the hearing held May 9, 1984, which resulted in the cancellation of some irrigation rights from the Blue Creek Canal.

On June 21, 1988, the director found that both appropriations, D-785 and D-795, had been examined for nonuse and orders of adjudication were entered March 4, 1985, and December 17, 1984, and that the department had erred in the adjudication in 1984 with regard to the cancellation of parts of the appropriation. The director found that the field investigation revealed that some of the lands involved in the applications had not been irrigated from the Blue Creek Canal for more than 3 consecutive years. An appropriation or a part of one that has been canceled for nonuse has no existence and cannot be transferred. For that reason it must first be determined whether a valid appropriation exists prior to considering whether the location of use can be transferred. The evidence that Cochran had experimented with water from the canal in 1985 did not constitute a beneficial use as contemplated by the statute and would not sustain the appropriation. That part of water appropriation D-785 amounting to .88 cubic feet per second for 61.5 acres in the east half of Section 17 was canceled because a contrary finding would result in the diversion of water for the irrigation of lands not actually served, resulting in a reduced supply for Paisley and other junior appropriators, and because the public interest would not be served. Application T-62 was denied, and at the request of the District, application T-61 was denied. The District had requested that unless both applications were granted, both should be denied.

The District's petition for rehearing was denied, and it has appealed.

The assignments of error can be summarized as follows: The director erred (1) in hearing the abandonment issue when it was not raised in the applications for transfer, (2) in finding there was a nonuse with no excuse for the preceding 3 years, (3) in requiring that the transfer applications be made in the name of the District, (4) in allowing the objection of Paisley Irrigation District, (5) in failing to grant the transfers, and (6) in "correcting" the order and findings made following the hearing of May 9, 1984.

The standard of review for an appeal from an order of the Director of Water Resources "is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable?" *In re Application A-15738*, 226 Neb. 146, 152, 410 N.W.2d 101, 105-06 (1987).

With regard to the appellant's first assignment of error, the issue is whether the director erred as a matter of law in hearing the nonuse issue when that issue was not raised by the application. Neb. Rev. Stat. § 46-229.02 (Reissue 1988) provides:

> If it shall appear that any water appropriation has not been used for some beneficial or useful purpose . . . for more than three consecutive years, the department shall appoint a place and time of hearing, shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause by such time and at such place why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than three consecutive years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. . . .
>
> A water appropriation may be canceled by the department without complying with sections 46-229.01 to 46-229.04 if the owner of such appropriation fails to comply with any of the conditions of approval in the permit.

The appellant contends that consideration of nonuse in a hearing on an application for transfer is not a proper procedure. In *State v. Nielsen*, 163 Neb. 372, 381, 79 N.W.2d 721, 728 (1956), this court held:

> The procedure referred to in sections 46-229 to 46-229.05, R.R.S. 1943, has to do with cancellation of irrigation rights and is not exclusive. The courts of this state have recognized two methods of loss of irrigation rights independent of statutory procedure for cancellation by the department of such rights. These two methods may be classified as abandonment of water rights, or nonuser of such rights for the period of statutory limitations relating to real estate.

The statutory procedure set out in Neb. Rev. Stat. § 46-229.04 (Reissue 1988) is not the exclusive procedure for canceling water rights. When an application is made to transfer water rights which no longer exist because of nonuse, the director may cancel the rights in the transfer proceeding if the evidence shows that the rights have expired through nonuse. It should be obvious that a right which does not exist should not be transferred.

The record supports the finding that the irrigation rights which were canceled had not been used for 3 years and, therefore, supports the finding that application for transfer T-62 be denied.

The report of Hayden, the field investigator for the department, was properly admitted at the hearing.

> (1) At such hearing the verified field investigation report of an employee of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no one appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled. If someone interested appears and contests the same, the department shall hear evidence, and if it appears that such water has not been put to a beneficial use or has ceased to be used for such purpose for more than three consecutive years, the same shall be declared canceled and annulled unless the department finds that there has been sufficient cause for

> such nonuse as provided for in subsection (3) of this section.

§ 46-229.04.

In *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 167, 313 N.W.2d 271, 275 (1981), this court held in an appeal from a proceeding canceling appropriations for nonuse:

> The statutes provide that in the first instance the Department bears the burden to establish nonuse for the statutory period. All that need be done to establish that fact is the verified report of the Department. Once that report is presented by the Department, then a hearing may be held if requested by the appropriators, at which time the appropriators must show cause why the appropriation should not be terminated. The language of the statute clearly indicates that the burden is upon the appropriator to present evidence showing either that water was taken, contrary to the report filed by the Department, or that some excuse existed for the water not being taken.

The District did not contest the findings of the field report and did not offer any evidence contrary to what Hayden reported other than Cochran's testimony. There was no evidence of an excuse for failure to irrigate.

Cochran testified that in 1985 he had irrigated one portion of a field for 6 to 8 hours and another portion of the field for 2 to 3 hours as an experiment to see if he could use the surface water. This is consistent with the field investigator's report. The director's finding that this experimentation was not a beneficial *use* of the water appropriated for irrigation purposes was correct.

In *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979), this court considered the definition of "beneficial use": "[B]eneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation." *Id.* at 781, 280 N.W.2d at 78. The court held that the diversion of some amount of water into the irrigation ditch without application to the land, after the field inspection, did not constitute a beneficial use. Short periods of irrigation are not sufficient to defeat the finding that the land

had not been irrigated. A few hours of irrigation is insufficient to constitute a beneficial use of water appropriated to the District for irrigation of the land. It is clear from the record that the land has not been irrigated from the canal since 1979. Since 1979, the land has been irrigated by a center pivot sprinkler system, with underground wells as a water source.

If the District wanted to claim that the nonuse was excused, it was incumbent on the District to show that the nonuse was excused under § 46-229.04, which provides:

> (2) If it is determined that such water has not been put to beneficial use or has ceased to be used for such purpose for more than ten consecutive years, the water right shall be declared canceled and annulled, except that for any water appropriation or part of a water appropriation on any tract of land under separate ownership, sufficient cause for nonuse shall be deemed to exist even if the period of nonuse was for more than ten consecutive years if the landowner used the available water supply on only part of the land under the water appropriation because of an inadequate water supply.
>
> (3) If the period of nonuse did not exceed ten consecutive years, sufficient cause shall be deemed to exist if such nonuse was a result of one or more of the following:
>
> (a) The land subject to the appropriation was placed under an acreage reserve or production quota program or otherwise withdrawn from use as required for participation in any federal or state program;
>
> (b) Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;
>
> (c) The available water supply was inadequate to enable the owner to use the water for a beneficial or useful purpose;
>
> (d) Use of the water was unnecessary because of climatic conditions;
>
> (e) Circumstances were such that a prudent person, following the dictates of good husbandry, would not have been expected to use the water;
>
> (f) The works, diversions, or other facilities essential to

use of the water were destroyed by a cause not within the control of the owner of the appropriation, and good faith efforts to repair or replace the works, diversions, or facilities have been and are being made;

(g) The owner of the appropriation was in active involuntary service in the armed forces of the United States or was in active voluntary service during a time of crisis; or

(h) Legal proceedings prevented or restricted use of the water.

The department may specify by rule and regulation other circumstances which shall be deemed to constitute sufficient cause.

The only evidence presented which might constitute an excuse was Cochran's statement that the sandy condition of the soil made irrigation from the canal difficult. No other evidence of excuse was provided.

With regard to the assignment of error relating to the requirement that the transfer applications be brought in the name of the District, the statute allowing for transfers states:

> Any person having a permit to appropriate water for beneficial purposes issued pursuant to Chapter 46 who desires to transfer the use of such water appropriation to a different location within the same river basin than that specified in the permit shall apply for approval of such change to the Department of Water Resources.

Neb. Rev. Stat. § 46-290 (Reissue 1988).

The statute requires that the person having the permit apply for the transfer. There is nothing in the record which shows that any person other than the District owns appropriations D-785 and D-795. This assignment of error has no merit.

The District contends that the Paisley Irrigation District should not have been allowed to object because its water appropriation rights would not have been affected by the transfers. Paisley was authorized to object to the transfers by Neb. Rev. Stat. § 46-291 (Reissue 1988), which provides in part: "The notice shall state that any person may in writing object to and request a hearing on the application at any time prior to the elapse of two weeks from the date of final

publication."

The evidence shows that a part of the land in question had not been irrigated from the canal for some time. The Paisley district appropriation, which is junior in priority to the District's appropriations, would have less water in the creek to satisfy its appropriation if the transfers were allowed. If the transfers were granted, there would be a greater use of water by the District, leaving less water in the creek for Paisley. Paisley's objection was relevant and was properly considered by the director.

In considering an application for a transfer of water rights, the director is to consider whether the change of location will diminish the supply of water otherwise available and whether the requested change is in the public interest. Neb. Rev. Stat. § 46-294(3) and (5) (Reissue 1988). Paisley's objections specifically raised these two considerations, which the director could consider in granting or denying the transfers.

Finally, the District assigns as error the "correction" by the director of the order entered following the May 9, 1984, hearing. The order of the Director of Water Resources dated March 4, 1985, found that the lands subject to the T-62 transfer request were being irrigated prior to the order. At the 1984 hearing, Cochran testified that he was irrigating the land subject to application T-62 with two center pivots, that the District was recharging his well used by the pivots, that outside of the pivots he actively flood-irrigated the land, and that the seepage went south into the area irrigated by the pivots. No hydrologist testified at either the 1984 or the 1988 hearing that the water pumped from the center pivot wells was actually water from the Blue Creek Canal. The finding in 1984 that Cochran was irrigating the land from the Blue Creek Canal appears to have been erroneous. The testimony from both hearings supports the director's 1988 order. In any event, Cochran has not used water directly from the Blue Creek Canal for surface irrigation for at least 3 consecutive years and has not provided evidence of an excuse. Pursuant to the statutes, the water right was properly canceled.

The order on the present applications was entered June 21, 1988, more than 3 years after the prior order. It is the duty of the

Department of Water Resources to review the use of water to see that it is being used beneficially. Neb. Rev. Stat. § 46-229 (Reissue 1988) provides:

> All appropriations for water must be for some beneficial or useful purpose and, except as provided in sections 46-290 to 46-294 [intrabasin transfers], when the appropriator or his or her successor in interest ceases to use it for such purpose for more than three consecutive years, the right ceases.

The department has a duty to review periodically the use of water in Nebraska. Use of water may change from time to time, requiring a change in a previous order.

The 1984 decision did not prevent the director from now finding that the land has not been irrigated and that cancellation of the water right was appropriate.

The order of the director is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE WICKLINE, APPELLANT.
440 N.W.2d 249

Filed May 26, 1989. Nos. 88-687, 88-688.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant.
2. **Search and Seizure: Arrests.** A valid search as incident to an arrest without a warrant necessarily depends on the legality of the arrest itself.
3. _____: _____. A search made without a warrant is valid if made incidental to a lawful arrest.
4. **Right to Counsel: Identification Procedures.** Until an information has been filed, a defendant has no constitutional right to have the assistance of counsel during a police showup.
5. **Identification Procedures: Appeal and Error.** In determining whether a likelihood of misidentification exists, this court reviews the totality of the circumstances of each case.
6. **Identification Procedures: Due Process.** A showup identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive

to an irreparably mistaken identification that a defendant is denied due process of law; the admission of evidence of a showup without more does not violate due process.

7. **Convictions: Circumstantial Evidence.** A person charged in a criminal case may be convicted on the basis of circumstantial evidence.
8. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the jury, and the verdict of the jury must be sustained if, taking a view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

Thomas P. Herzog for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is a consolidated appeal taken from the Holt County District Court, where defendant, Lee Wickline, was charged by information on April 19, 1988, with burglary, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985). On May 3, 1988, the defendant filed motions to suppress pretrial and courtroom identification and to suppress certain physical evidence. These motions were denied in journal entries filed May 16 and 20, 1988.

On May 17, 1988, a second information was filed, charging the defendant with the additional crime of theft, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985), and with being a habitual criminal, in violation of Neb. Rev. Stat. § 29-2221(1) (Reissue 1985).

The two informations were consolidated for trial and tried before a jury. On June 7, 1988, the jury returned verdicts finding the defendant guilty of theft by unlawful taking, and burglary.

The court overruled defendant's motion for a new trial and, on June 22, 1988, determined, after a hearing, that the

defendant was not a habitual criminal. On that same day the defendant was sentenced to the Nebraska Department of Correctional Services on the theft and burglary charges for a term of 6 to 10 years on each count, with the sentences to be served concurrently.

The defendant timely appealed to this court and assigns as errors the actions of the district court (1) in denying defendant's motion to suppress as evidence certain cigarette butts and a screwdriver, (2) in finding that the showup identification of the defendant was not prejudicial to the defendant's rights, and (3) in determining that the jury verdicts were supported by sufficient evidence. We affirm.

The record shows the following. At approximately 1:30 a.m. on April 7, 1988, three residents driving around the streets of Ewing (population 520), Holt County, Nebraska, observed the defendant, carrying a backpack, walking down the town's main street. These residents saw a car with South Dakota license plates parked with a flat tire approximately 150 feet from the defendant. One of these residents called to the defendant to see if he needed any help. The defendant responded, "[N]o, leave me alone." These residents then drove around the block and observed the defendant run into an alley, where he hid behind a utility pole. They asked defendant what he was doing, and he responded that he was looking for a place to sleep.

These residents then notified a local police officer. This officer checked the registration of the vehicle the defendant was seen near and determined that the vehicle was owned by a South Dakota resident and had been stolen from the BG&S transmission shop in O'Neill, Nebraska.

At approximately 5 a.m., this officer received a telephone call from a Ewing resident and was told that someone was in her backyard. Upon his arrival, the officer found defendant sleeping, with his head on his duffel bag. A partially empty bottle of wine and two beer cans were nearby. The officer took defendant to the Ewing police station and informed him of his rights per *Miranda*.

There, the Ewing police officer saw defendant smoking a Salem brand cigarette. At a later time this officer took the cigarette butt from the ashtray and marked it as evidence.

The officer had one of the residents who had observed the defendant near the stolen vehicle identify the defendant at the police station. This witness stood outside the police station, looked through the door window, and after viewing the defendant seated approximately 10 feet away in a lighted room, identified defendant as the man the witness had seen near the vehicle earlier that morning. After this identification, defendant was arrested for suspicion of auto theft.

The officer and defendant then returned to the backyard where the defendant had been sleeping. There, the officer obtained the defendant's duffel bag, the cans of beer, the bottle of wine, and, at a later time, Salem brand cigarette butts near the area where the defendant had been sleeping.

Defendant and the officer then left for the county jail located at O'Neill. During the defendant's processing at the jail, the officers discovered a claw hammer, screwdriver, and toiletry items in the defendant's duffel bag, and a large amount of change.

The arresting officer then returned to Ewing, where he conducted a thorough search of the stolen vehicle. During this search, the arresting officer seized as evidence the contents of the vehicle's ashtray, which contained numerous gum wrappers and cigarette butts, at least one of which was a Salem brand.

Upon returning to the Ewing police station, the arresting officer was informed by the Holt County Sheriff's Department in O'Neill that during the night a burglary had occurred at the BG&S transmission shop in O'Neill. The arresting officer was also told that the BG&S moneybag was missing. Upon receiving this information, the Ewing police officer returned to the location of the stolen vehicle and conducted a thorough search. Approximately 18 feet from the front of the vehicle, the arresting officer found the keys to the vehicle, and on the roof of a nearby business he found a moneybag identified later as the one taken from the BG&S transmission shop.

During this same period of time a Holt County sheriff's officer in O'Neill determined that one of the BG&S doors had been entered with some type of prying device.

The sheriff's deputy then went back to the county jail, where the defendant's belongings were searched for a second time.

During this search the deputy found another sack of change in the defendant's belongings and $466 in paper currency in the defendant's eyeglass case. The currency was in similar denominations, and in a similar amount, to that stolen from the transmission shop. Defendant did not testify at the trial.

In his appeal defendant contends that the trial court erred in admitting into evidence the cigarette butts and the screwdriver, since they were found in a search incident to an unlawful arrest. We must first determine whether the defendant's arrest was unlawful.

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant. See, *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988); *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). A valid search as incident to an arrest without a warrant necessarily depends on the legality of the arrest itself. *State v. Blakely, supra.*

At the time of defendant's arrest for suspicion of auto theft, the Ewing police officer was aware of the following: (1) The defendant had acted suspiciously when encountered by Ewing residents; (2) the vehicle the defendant had been seen near had a flat tire and had apparently been abandoned; (3) the vehicle had been stolen; and (4) defendant was found asleep just a block away from the stolen vehicle, trespassing on another person's property. Based on this information the officer had probable cause to arrest defendant without a warrant. The arrest was lawful.

Only after the defendant had been placed under arrest did the arresting officer search defendant's belongings. During this search the officer recovered a screwdriver, which was later admitted at trial as evidence that it was of the type of instrument used to pry open the BG&S transmission shop door. The defendant was under arrest at the time, and all items seized from his person and personal belongings were seized incident to the defendant's arrest. A search made without a warrant is valid if made incidental to a lawful arrest. *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981); *United States v. Garcia*, 785 F.2d

214 (8th Cir. 1986), *cert. denied, Barker v. United States*, 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342; *State v. Agnew*, 184 Neb. 700, 171 N.W.2d 542 (1969), *cert. denied* 399 U.S. 912, 90 S. Ct. 2207, 26 L. Ed. 2d 567 (1970).

Insofar as defendant contends that items taken from the stolen vehicle should have been suppressed as evidence, defendant lacks standing to challenge the seizure of those items. *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969).

Defendant's argument concerning the seizure of items he discarded as trash at the Ewing police department is without merit. The defendant abandoned these items and sufficiently exposed them to the officer and the public to defeat his claim to fourth amendment protection. See, *California v. Greenwood,* 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988); *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Defendant also contends that his constitutional rights were violated when he was not allowed representation by counsel during his showup identification at the Ewing police station. Until an information has been filed, a defendant has no constitutional right to have the assistance of counsel during a police showup. *State v. Smith*, 209 Neb. 86, 306 N.W.2d 181 (1981); *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

The defendant also contends that his police station identification was suggestive and likely to have resulted in his misidentification. In determining whether a likelihood of misidentification exists, this court reviews the totality of the circumstances of each case. *State v. Hunt*, 212 Neb. 214, 322 N.W.2d 621 (1982). A showup identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law; the admission of evidence of a showup without more does not violate due process. *State v. Johnson*, 214 Neb. 869, 336 N.W.2d 581 (1983).

The defendant was observed by the party who identified him

on two different occasions, once on the Ewing main street, when the defendant was observed walking away from the stolen vehicle, and again in a nearby alley. Approximately 4 hours later the Ewing resident identified the defendant without displaying or suggesting any uncertainty in her identification. We find that the circumstances of the defendant's identification were not unduly suggestive or likely to have led to a mistaken identification.

In the defendant's final assignment of error, he argues that there was insufficient evidence to support his convictions. A person charged in a criminal case may be convicted on the basis of circumstantial evidence. *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Defendant was first seen at an early morning hour near a stolen vehicle. In addition, money found on the defendant was similar in amount and denominations to money taken in the charged burglary.

In other evidence presented during the trial, a Nebraska State Patrol forensic serologist testified that she had analyzed the cigarette butts seized during the investigation. In her testimony, Reena Roy, Ph.D., stated that in the course of her analysis she checked the cigarette butts for amylase (an enzyme contained in saliva) and for blood group substances. From her examination of these cigarette butts, she determined that the saliva on the cigarette extinguished by the defendant in the Ewing police station was of the same blood group as the saliva on at least one of the cigarette butts extinguished in the stolen vehicle ashtray.

In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the jury, and the verdict of the jury must be sustained if, taking a view most favorable to the State, there is sufficient evidence to support it. *State v. Swift*, 230 Neb. 373, 431 N.W.2d 643 (1988); *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988). The evidence, when viewed in light of these rules, was sufficient to justify the district court in submitting the case to the jury, and was also sufficient for the jury to have found the defendant

guilty of theft by unlawful taking and burglary.

There is no error in the court below, and the district court's decisions are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLENN F. BLUE BIRD, APPELLANT.

440 N.W.2d 474

Filed May 26, 1989. No. 88-690.

1. **Convictions: Circumstantial Evidence: Proof.** A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.
2. **Criminal Law: Intent: Circumstantial Evidence: Proof.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
3. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

James R. Wefso, of Crites, Shaffer, Connealy, Watson & Wefso, for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In a bench trial, the district court for Sheridan County convicted and sentenced Glenn F. Blue Bird for theft in violation of Neb. Rev. Stat. § 28-511 (Reissue 1985), which provides:

> (1) A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.
>
> . . . .
>
> (3) . . . [I]t shall be presumed that a lessee's failure to return leased or rented movable property to the lessor after the expiration of a written lease or written rental agreement is done with intent to deprive if such lessee has been mailed notice by certified mail that such lease or rental agreement has expired and he or she has failed within ten days after such notice to return such property.

The grade of the theft offense charged against Blue Bird was a Class I misdemeanor because the subject property had a value greater than $100 but less than $300, see Neb. Rev. Stat. § 28-518(3) (Reissue 1985), and, therefore, was punishable by imprisonment for a term not exceeding 1 year, up to a $1,000 fine, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 1988). The court sentenced Blue Bird to imprisonment for 1 year with credit for Blue Bird's jail time before sentence.

Blue Bird appeals, claiming that the evidence is insufficient to sustain his conviction and that the imposed sentence is excessive.

FACTS

On June 2, 1988, in Gordon, Sheridan County, Nebraska, Blue Bird was carrying identification documents for a Malcolm Folson, Blue Bird's deceased relative, and entered the MJM video store. Blue Bird presented Folson's identification to MJM's clerk, gave his address as John's Trailer Court, Lot 6, in Gordon, signed a form listing the conditions and provisions for video equipment rental, rented a videocassette recorder (VCR) and a videotape of "A Man Called Tiger," paid the rental fees in cash, and promised to bring the VCR and videotape back to MJM the next day. Blue Bird had rented the VCR and tape for use at Velma Hollow Horn's home, but, when he learned that Hollow Horn and her family had left town, Blue Bird transferred the VCR and tape to Georgeann No Horse, also known as Georgeann No Neck, a visitor from Kyle, South

Dakota, from whom Blue Bird received no money for the transferred videotape and VCR. The MJM rental agreement with Blue Bird prohibited the customer's loaning MJM video equipment to a third person.

On June 3, after the video equipment was supposed to have been returned to MJM, one of MJM's employees reported to Officer James Demicell of the Gordon Police Department that an individual, identified as Malcolm Folson of John's Trailer Court, had failed to return the VCR and tape. MJM's employee gave a detailed description of the person identified as Malcolm Folson, who had obtained the video equipment and tape. Demicell went to John's Trailer Court, the address given by Folson in the rental agreement, where Demicell was told that none at the trailer court knew a Malcolm Folson. Shortly after midnight on June 4, Demicell encountered a group of people near a parked automobile in Gordon. A man inside the parked car identified himself as Malcolm Folson, but one of the group later identified the vehicle's occupant as Glenn Blue Bird, whom Demicell then recognized in view of prior contacts with Blue Bird. Demicell arrested Blue Bird concerning the transaction at MJM and, after Demicell's administration of the *Miranda* warning, Blue Bird admitted that he had rented the VCR and videotape and told Demicell that the video items were at Hollow Horn's home. However, Demicell was unable to locate the video equipment at the Hollow Horn home.

After his arrest and while Blue Bird was in the custody of David Lyon, a deputy sheriff of Sheridan County, Blue Bird stated that he had leased the video equipment to a Virginia No Neck of Kyle, Shannon County, South Dakota. At Lyon's request, the deputy sheriff of Shannon County undertook a search for the video equipment. Eventually, Oglala Sioux tribal police discovered the video equipment in the possession of Georgeann No Horse on the Pine Ridge Reservation in Shannon County.

SUFFICIENCY OF EVIDENCE

Blue Bird admits that he rented the VCR and videotape from MJM and that he failed to return the items to MJM in accordance with his rental agreement, but argues that the

evidence fails to show Blue Bird's intent to deprive MJM of the VCR and tape.

> In determining whether evidence is sufficient to sustain a conviction in a bench trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.

State v. Vejvoda, 231 Neb. 668, 671, 438 N.W.2d 461, 465 (1989).

A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence. See *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

"When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 141, 416 N.W.2d 231, 237 (1987). Evidence established that Blue Bird gave MJM a false name and address at the time he rented the VCR and tape, transferred the equipment to a woman who lived in another state, and failed to return MJM's property as agreed. These facts provided sufficient circumstantial evidence to support a factual finding that Blue Bird intended to deprive MJM of its VCR and tape.

Blue Bird also argues that, in reference to a theft related to leased movable property, the occurrences specified in § 28-511(3), namely, mailing of a certified notice and failure of the lessee to return the property within 10 days, are prerequisites to a finding that the lessee intended to deprive another of property. Section 28-511(3) provides predicates for a presumption of a defendant's intent rather than factual conditions precedent or contingencies for a conviction of theft.

Utilization of a presumption in the trial of a criminal case is governed by Neb. Evid. R. 301 and Neb. Evid. R. 303 (Neb. Rev. Stat. §§ 27-301 and 27-303 (Reissue 1985)). Nevertheless, in view of the evidence against Blue Bird and the absence of any presumption invoked under § 28-511(3) and applied under the Nebraska Evidence Rules, the circumstances afforded the basis for a reasonable inference drawn by the fact finder that Blue Bird intended to deprive MJM of its movable property in violation of § 28-511(1). Further discussion concerning utilization of a statutory presumption in a criminal case is unnecessary.

EXCESSIVE SENTENCE

"A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt, ante* p. 237, 240, 440 N.W.2d 234, 236 (1989).

At the time of sentencing, there was reference to Blue Bird's criminal record, which included convictions for theft, forgery, assault, failing to appear in court on a criminal charge, drunk driving, and Blue Bird's operating a motor vehicle while his driver's license was suspended. Under the circumstances, the trial court did not abuse its discretion in sentencing Blue Bird to 1 year's imprisonment for the conviction of theft.

CONCLUSION

Blue Bird's assignments of error are without merit; the evidence is sufficient to support the conviction; the sentence imposed is not excessive; and the conviction and sentence are affirmed in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD R. AUMAN, JR., APPELLANT.

440 N.W.2d 254

Filed May 26, 1989. No. 88-696.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Verdicts: Evidence: Appeal and Error.** This court on appeal will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt.
3. **Criminal Law: Trial: Proof.** In a criminal case the State must prove beyond a reasonable doubt all material elements in its case in chief.
4. **Prisoners: Battery.** Neb. Rev. Stat. § 28-932 (Reissue 1985) primarily prohibits a lawfully confined person from injuring another person by intentionally, knowingly, or recklessly committing a battery upon the other person.
5. **Battery: Words and Phrases.** A battery may be defined as any intentional, unlawful physical violence or contact inflicted on a human being without his consent.
6. **Battery: Prisoners.** There can be no violation of Neb. Rev. Stat. § 28-932 (Reissue 1985) unless a bodily injury to another person is proximately caused by an intentional, knowing, or reckless overt act of a legally confined person or the legally confined person's accomplice.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and dismissed.

Tad D. Eickman, of Steinacher, Vosoba & Hanson, for appellant.

Robert M. Spire, Attorney General, and William L. Howland for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Richard R. Auman, Jr., appeals his jury conviction for intentionally, knowingly, or recklessly causing bodily injury to a deputy sheriff while the defendant was legally confined in the Saline County jail.

As a result of his felony conviction, Auman was sentenced to 1 year in jail with work release privileges. We vacate the sentence, reverse the conviction, and dismiss the charge.

Auman was prosecuted under Neb. Rev. Stat. § 28-932(1) (Reissue 1985), the relevant part of which provides: "Any person who is legally confined in a jail . . . and intentionally, knowingly, or recklessly causes bodily injury to another person shall be guilty of a Class IV felony."

In view of the conclusions reached, only one of Auman's five assignments of error need be discussed: that the evidence was insufficient to convict him. Arguing the insufficiency of evidence, Auman, at the close of the State's evidence and at the conclusion of all the evidence, asked the trial court to dismiss the charge against him or direct a verdict of acquittal. The requests were erroneously overruled.

In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Lehl,* 231 Neb. 906, 438 N.W.2d 505 (1989); *State v. Davis,* 231 Neb. 878, 438 N.W.2d 772 (1989).

On the other hand, this court on appeal will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. See, *State v. Hai Dang*, 220 Neb. 120, 368 N.W.2d 486 (1985); *State v. French*, 206 Neb. 92, 291 N.W.2d 248 (1980). Also, in a criminal case the State must prove beyond a reasonable doubt all material elements in its case in chief. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

When he saw the defendant in the Saline County Courthouse on January 7, 1988, Saline County Deputy Sheriff Richard Merrill remembered that there was an outstanding Lancaster County warrant for Auman's arrest. It was on a bad check charge. Merrill asked Deputy Sheriff Stahl to escort Auman to the jail facility. Auman voluntarily accompanied the deputy

sheriff to the jail. At the jail, Merrill told Auman of the outstanding warrant and said that it involved a bad check charge in Lancaster County. Auman was placed under arrest. The defendant was not free to leave the jail facility after his arrest. Merrill instructed the sheriff's dispatcher to determine if Lancaster County authorities would return Auman to Lincoln or if the defendant could be released on bail.

After spending 5 to 10 minutes in the jail's front office, Auman was taken to the booking room. Merrill requested that Auman place his personal belongings on a table. Merrill also requested Auman's thumbprints for a jail admission form. The defendant refused both requests. Auman became verbally abusive and claimed his constitutional rights were being violated. Merrill asked the sheriff for assistance. Auman's attorney in another matter, who was in the building, appeared and told Auman to cooperate. Merrill, the sheriff, and Auman's attorney left Auman in the booking room so that Auman could "cool down."

Shortly after leaving the room and closing the door, Merrill heard what sounded like glass breaking. Merrill, the sheriff, and a Saunders County law enforcement officer who was present entered the booking room and found that Auman had overturned chairs, moved a table, and was "wrecking the booking room." The sheriff grabbed Auman. Merrill took hold of Auman's right arm, and the other officer took hold of Auman's feet. Auman was wrestled to the floor. The defendant was handcuffed, and his legs were hobbled with his belt.

At the defendant's preliminary hearing in the Saline County Court, Merrill, whose arm had been injured in an incident not involving the defendant, testified that his arm was reinjured when he was "hanging onto [Auman's] right arm" and Auman "was jerking it away from me." Had Merrill testified at trial to this version of his reinjury, it might well have supported Auman's conviction. However, this evidence was never introduced at the jury trial.

At the jury trial, Merrill and several other witnesses testified that while Auman was being transferred from the booking room to a stairwell leading to an isolation cell, the defendant was at times abusive and physically active. However, at trial,

neither Merrill nor any other witness described any overt act by Auman that proximately caused reinjury to the deputy sheriff's left elbow.

Merrill testified that the officers carried Auman from the booking room to a stairwell leading to an upstairs solitary confinement area. At the bottom of the stairwell, the defendant still would not walk. Instead, Auman lay down. Merrill further testified: "As we were trying to lift Mr. Auman to go up the stairs, I *apparently* reinjured myself by pulling the tendons in the elbow and I could no longer use my left arm." (Emphasis supplied.) Merrill also testified that he reinjured his arm while the officers were carrying Auman from the booking room to the stairwell. Merrill gave no testimony causally relating the reinjury of his arm to any overt act of the defendant. At another point, the deputy testified that "[a]s I got to the stairwell, I reinjured my arm, too painful to continue on." "I had [severe] throbbing in my arm and my left hand swelled up considerably." Again, there was no testimony by Merrill that causally related the reinjury of his left arm to any intentional, knowing, or reckless overt act of Auman. Merrill said he had no further bodily contact with Auman. The defendant was carried up the stairs and placed in an isolation cell by law enforcement officers, without the physical assistance of Deputy Merrill.

As a matter of law, the witnesses' testimony at the jury trial and the inferences that may be drawn therefrom are insufficient to prove beyond a reasonable doubt that any overt act by Auman was the proximate cause of the reinjury to Deputy Sheriff Merrill's person.

Though other factual situations may fall within the prohibition of the statute, § 28-932 is primarily intended to discourage a lawfully confined person from injuring another person by intentionally, knowingly, or recklessly committing a battery upon that other person. A battery may be defined as any intentional, unlawful physical violence or contact inflicted on a human being without his consent. See *Bergman v. Anderson*, 226 Neb. 333, 411 N.W.2d 336 (1987). There can be no violation of § 28-932 unless a bodily injury to another person is proximately caused by an intentional, knowing, or reckless overt act of a legally confined person or the legally

confined person's accomplice.

In this case, the only evidence before the jury was that Merrill reinjured his arm while lifting or carrying Auman. There was no evidence that this reinjury was proximately caused by an overt act of the defendant. That being so, there was insufficient evidence as a matter of law for a jury to find beyond a reasonable doubt that Auman is guilty of the charge against him. The defendant's sentence is vacated, his conviction reversed, and the charge against him dismissed.

REVERSED AND DISMISSED.

IN RE INTEREST OF D.S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. K.S., APPELLANT.

440 N.W.2d 477

Filed May 26 1989. No. 88-879.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an adjudication in a juvenile court under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof.** In proceedings for an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), the allegations of the State's petition must be proved by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Reversed and remanded with direction to dismiss.

Janet S. Gurwitch for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

SHANAHAN, J.

K.S., the mother of the female, D.S., appeals from the judgment of the separate juvenile court of Douglas County, which found that D.S. was a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) of the Nebraska Juvenile Code. Section 43-247(3)(a) authorizes a juvenile court's jurisdiction over "[a]ny juvenile . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian . . . ."

In an appeal from an adjudication in a juvenile court under § 43-247(3)(a), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, *In re Interest of A.L.G.*, 230 Neb. 732, 432 N.W.2d 852 (1988); *In re Interest of K.L.C. and K.C.*, 227 Neb. 76, 416 N.W.2d 18 (1987). Cf. *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987) (de novo review on the record in the appeal of an equity case). In proceedings for an adjudication under § 43-247(3)(a), the allegations of the State's petition must be proved by a preponderance of the evidence. Neb. Rev. Stat. § 43-279.01(3) (Reissue 1988).

In its petition, the State alleged that D.S., being under the age of 18 years, was a child within the meaning of the Nebraska Juvenile Code and lacked

> proper parental care by reason of the faults or habits of [K.S.], natural mother of said child, in that:
>
> A. On or about May 11, 1988, said child was taken into protective custody by Omaha Police after she had been disciplined by being struck with a baseball bat by [K.S.], suffering marks and bruises.
>
> B. [K.S.] is frustrated and confused by said child's "ungovernable" adolescent behavior.
>
> C. Said child is confused and frustrated by [K.S.'] expectations and means of discipline and fears returning home at this time.

Pending an adjudication hearing, D.S. was placed in the temporary custody of the Department of Social Services of the State of Nebraska. At the adjudication hearing, only the child, D.S., testified.

D.S. was 14 years old at the time of the incident alleged in the State's petition, was in junior high, and attended special classes for her learning disabilities. Apparently D.S.' parents were separated from one another. The mother, K.S., worked and also attended school, necessitating her periodic absence from the family home. Although K.S. had talked with D.S. about sexual behavior and warned the child about sexual activity at an early age, D.S. became "sexually active," a source of concern for her mother, who took D.S. to visit a physician and obtain contraceptives. K.S. supplied D.S. with birth control pills.

Because her mother was absent from home for appreciable periods involving work and school, D.S. was frequently left in charge of the house and babysat her 10-year-old brother. On such occasions, D.S. was responsible for fixing meals and taking care of other household chores, although those activities impinged on D.S.' time available for homework in view of her scholastic difficulties. As D.S. expressed: "I barely passed last year."

When D.S. was in charge of the house, there was a definite and longstanding rule which had been imposed by K.S.: D.S. was forbidden to have her boyfriends in the house during K.S.' absence. D.S. understood the rule, but not the reason for the rule. On occasions when D.S. broke the rule of "no boyfriend in the house," K.S. never corporally punished D.S., but did "ground" the girl, that is, confined D.S. to the child's room, or gave her more housework as punishment.

On May 11, K.S. gave D.S. the key for the house while K.S. attended school. During her mother's absence, D.S. invited her boyfriend into the house, where the couple engaged in sexual intercourse. When K.S. returned around 5 p.m., D.S. had to unlock the door for her mother. As K.S. entered the house, D.S.' boyfriend "jumped off the roof because he was scared." K.S. grabbed D.S. by the arm and, with a "foot long" wooden "bat," hit D.S. three or four times above the child's knees, causing some "welts" or marks which became "bluish."

Concerning the "bat," we conclude that this item was a miniature replica of a baseball bat, perhaps similar to those available as souvenirs at ball parks. In any event, there is no photograph of the bat or the marks on D.S.' legs as the result of the physical punishment administered by K.S. The record contains no reference to medical treatment for D.S. or any medical diagnosis on account of the "bat" incident. However, the next day at school, one of D.S.' teachers noticed the marks on the child's legs.

According to D.S., she was "shocked," since her mother had never previously administered corporal punishment, except for a slap on the hand, for any misconduct. In reference to the incident in question, D.S. described herself as "angry" and said that she wanted to leave the family home because "I was sort of like hard-headed at the time and I didn't want to accept her [K.S.'] rules and stuff." D.S. manifested her reluctance to return to her family home with K.S. "because I was scared and I didn't know what was going to happen or not."

The specter of child-battering by a baseball bat, hyperbolically alleged in the State's petition, paled and then vanished in the light of testimony or disappeared into the dark depths of unproved allegations. If merely parental frustration and confusion in rearing an adolescent were blameworthy bases to bring a child within the purview of the Nebraska Juvenile Code, a great number of parents would find themselves exposed to governmental intrusion into raising their children. In our de novo review, we find that the State has failed to establish that D.S. is a child "who lacks proper parental care by reason of the fault or habits of" her mother, K.S. Therefore, we reverse the judgment of the juvenile court and remand this matter to the juvenile court with direction to dismiss the State's petition.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. ELBERT L. ANDERSON, APPELLANT.

440 N.W.2d 257

Filed May 26, 1989. No. 89-080.

Drunk Driving: Prior Convictions: Proof: Right to Counsel: Waiver. In order to prove a prior drunk driving conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant had counsel, or knowingly, voluntarily, and intelligently waived the right to counsel.

Appeal from the District Court for Pierce County: MERRITT C. WARREN, Judge. Reversed and remanded with directions.

David R. Uher for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

In the county court defendant-appellant, Elbert L. Anderson, pled guilty to driving while drunk and, following an enhancement hearing, was sentenced for a third such offense. He unsuccessfully appealed to the district court, and now asserts that the district court erred in failing to find error on the record made in the county court, claiming that the evidence fails to support a finding that he "was twice previously convicted of driving under the influence of alcoholic liquor." We reverse the district court's affirmance of the county court sentence and remand with directions.

At the enhancement hearing, the State offered, and the county court received, two exhibits, each of which attests to the facts that Anderson pled guilty to, and was convicted of, driving while drunk. Anderson objected to the receipt of one of the exhibits on the ground it is internally inconsistent and, thus, fails to establish he had freely, intelligently, and voluntarily waived his right to counsel.

Anderson's contention relies on, among other things, certain discrepancies in the checklist portion of the questioned exhibit which is denominated "Journal Entry." That document

displays a handwritten "x" before the typed lines which recite that Anderson was advised of his right to counsel and that he waived such right. However, while the word "not" in the typed lines of the journal entry which read that the court found "the plea(s) was/were (not) freely, knowingly, voluntarily and intelligently made" is crossed out in pen, there are no marks of any kind on the lines which read that the court found Anderson's various waivers, including that of the right to counsel, "were (not) knowingly, voluntarily and intelligently made."

Thus, read literally, the journal entry recites that Anderson's waiver of his right to counsel was made other than "knowingly, voluntarily and intelligently," notwithstanding the fact that he was advised of the right and waived it.

We have said that in order to prove a prior drunk driving conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). Implicit in that statement, however, is the requirement that the waiver be made knowingly, voluntarily, and intelligently. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986). The questioned exhibit fails to establish such a waiver of counsel, and the county court thus erred in receiving the questioned exhibit in evidence. Without that exhibit, the evidence is, as Anderson claims, insufficient to support a finding that the present occasion is the third time he has been convicted of drunk driving.

Accordingly, the district court's affirmance of the sentence must be, and hereby is, reversed. The cause is remanded to district court with the directions that it vacate and set aside the county court's sentence and remand the matter to that court for further proceedings pursuant to law.

REVERSED AND REMANDED WITH DIRECTIONS.

THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, APPELLEE, V. ROLLAND L. VICTOR AND MARJORIE M. VICTOR, HUSBAND AND WIFE, APPELLANTS, STATE NATIONAL BANK AND TRUST COMPANY ET AL., APPELLEES.

440 N.W.2d 667

Filed June 2, 1989. No. 86-295.

1. **Appeal and Error.** To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
2. **Mortgages: Foreclosure: Equity: Appeal and Error.** An action to foreclose a mortgage is an equity action, which, on appeal, the Supreme Court reviews de novo on the record.
3. **Mortgages: Foreclosure: Receivers: Appeal and Error.** The appointment of a receiver in conjunction with a mortgage foreclosure action is within the discretion of the trial court, whose decision, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
4. **Mortgages: Foreclosure: Receivers: Debtors and Creditors.** Appointment of a receiver is an adjunct to a mortgage foreclosure action and serves to conserve the mortgaged property or apply rents and profits from the mortgaged property toward satisfaction of the indebtedness secured by the mortgage.
5. _____: _____: _____: _____. A mortgagee's application for appointment of a receiver in a foreclosure action may be granted on a showing (1) the mortgaged property is in danger of being lost, removed, or materially injured, or (2) a probability exists that the mortgaged property has insufficient value to discharge the mortgage debt.

Appeal from the District Court for Wayne County: MERRITT C. WARREN, Judge. Affirmed.

William J. Rieb for appellants.

Dennis W. Collins, of Jewell, Gatz, Collins & Dreier, for appellee Federal Land Bank.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RONIN, D.J., Retired.

SHANAHAN, J.

In its action in the district court for Wayne County, The Federal Land Bank of Omaha (FLB) sought foreclosure of a mortgage signed by Rolland L. and Marjorie M. Victor and requested the appointment of a receiver. After a hearing on the receivership issue, the district court found that the mortgaged real estate was "probably insufficient to discharge the

indebtedness owed to [FLB] as set forth in [FLB's] petition" and that since Victors were in default on their promissory note secured by the mortgage, appointment of a receiver was appropriate. Victors appeal, claiming that FLB's alleged failure to comply with certain provisions of federal law precludes appointment of a receiver. See Neb. Rev. Stat. § 25-1090 (Reissue 1985) (appointment of receiver: appealable order).

On March 9, 1976, Victors signed a 34-year variable interest rate promissory note in the amount of $154,000 payable to FLB. An installment payment on the note was due on January 1 of each year. As security for their promissory note, Victors gave FLB a mortgage on their quarter section in Wayne County, which mortgage, by its terms, was "subject to the provisions of THE FARM CREDIT ACT and all acts amendatory thereof or supplemental thereto." The mortgage did not cover the real estate which was Victors' homestead.

Victors paid their note through January 1, 1983. Victors' payment due on January 1, 1984, was made 1 month late. However, apparently on account of a dispute regarding another creditor's lien on Victors' crops, the payment due on January 1, 1985, was not made. After Victors missed the 1985 payment, numerous communications occurred between Victors and FLB in an attempt to resolve Victors' financial difficulties. On August 30, 1985, FLB sent written notice to Victors, stating that FLB would recommend foreclosure of the mortgage in view of Victors' default in payment of their note. The notice also informed Victors that they could "appeal" from this recommendation by contacting the Norfolk FLB office within 30 days after receipt of the notice.

Victors took advantage of the option to appeal and met with an FLB employee soon after receipt of the notice about potential foreclosure. As a result of this meeting and on September 27, 1985, FLB sent a letter to Victors stating that the FLB

> would not accelerate the loan on September 30 and in lieu of not accelerating the loan the Victors would agree to furnish [FLB] with a current financial statement and a plan of operation showing how they proposed to pay the delinquent January 1, 1985 payment as well as the

upcoming January 1, 1986 installment.

Instead of complying with FLB's request for financial information, Victors sought information pertaining to the FLB's "policy of forbearance," and requested another meeting with FLB officials. On October 29, 1985, Victors again met with FLB representatives and were shown a "condensed version" of FLB's written policy on forbearance. FLB's forbearance information given to Victors provided in part:

> Forbearance is any voluntary deferral of legal action by the Association/Bank when borrower is in default.
>
> Forbearance may be granted if:
>
> 1. Borrower is cooperative;
>
> 2. Borrower is making conscientious effort to meet loan terms;
>
> 3. Borrower has reasonable potential of restoring credit worthiness; and,
>
> 4. Action does not jeopardize the Association/Bank's financial position.

In addition to Victors' receipt of the forbearance information, an FLB loan officer told Victors that any decision to accelerate payment of their loan could be appealed to a "higher board." As a result of this meeting, FLB agreed to forbear proceedings until December 1, 1985.

Sometime after December 1, 1985, a loan manager of FLB's Norfolk branch informed Victors that FLB's forbearance would be terminated due to Victors' failure to satisfy certain requirements on which the forbearance was conditioned.

January 1, 1986, passed with no annual payment by Victors on the FLB loan. On January 27, FLB determined that Victors, due to their lack of credit worthiness and inability to work out a plan of payment, no longer met the requirements for forbearance. Therefore, installment payments on Victors' note were accelerated on account of Victors' default. On February 25, FLB petitioned for foreclosure of the mortgage from Victors and appointment of a receiver for the mortgaged property. In their answer and counterclaim, Victors alleged that FLB "failed to comply with the Farm Credit Act of 1971, as amended thereto," federal law which was incorporated into the mortgage for which FLB sought foreclosure.

At the hearing on March 5 for appointment of a receiver, evidence showed that Victors owed $127,729.97 on their note to FLB. A licensed appraiser testified that the Victors' land, which was subject to the FLB mortgage, had a fair market value of $96,000. Victors offered an affidavit of another appraiser, which indicated the value of their property was $137,000. At the conclusion of the hearing, the court took the receivership application under advisement and on March 14 found that the Victors were in default on their loan from FLB and that the value of the mortgaged property was "probably insufficient to discharge the mortgaged debt." See Neb. Rev. Stat. § 25-1081(2) (Reissue 1985) (grounds for receivership; mortgaged property). In conjunction with its March 14 decision regarding appointment of a receiver, the court remarked:

> It is clear from the great weight of authority that the Farm Credit Act as it existed prior to the 1986 amendments did not create private rights in the borrowers, to be asserted either as causes of action for damages or as defenses in foreclosure actions; and the regulations under that act, including the regulation on providing a means of forbearance, did not either.
>
> . . . .
>
> Despite the fact that I believe the plaintiff has given the defendants Victor the benefit of its forbearance and review policies, I do not believe the [Farm Credit Amendments Act of 1985] created new private rights which can be asserted against the FLB as a cause of action or as a defense to foreclosure. . . .
>
> Beyond the above considerations, which go to the merits of the defense pleaded by the Victors, the immediate question before the Court is whether a Receiver should be appointed.

The court then found that appointment of a receiver was warranted under the circumstances, appointed the receiver, and approved the corporate surety bond for the receiver.

Victors appeal, contending that the district court erred, first, in excluding evidence of FLB's alleged failure to comply with the Farm Credit Amendments Act of 1985, and, second, in

holding that the FLB's alleged noncompliance with the Farm Credit Amendments Act of 1985 was not a defense to the FLB's foreclosure action.

Victors' first assigned error (exclusion of evidence) was not discussed in the text ("argument") of their brief. See Neb. Ct. R. of Prac. 9D(1)g (rev. 1989). To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Wells Fargo Ag. Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986). Therefore, we will not consider the evidential error assigned by Victors.

Before we discuss Victors' second assignment of error, namely, whether the district court committed reversible error concerning FLB's alleged noncompliance with federal law pertaining to a mortgage foreclosure, we examine the function or role of a receiver and the nature of proceedings for appointment of a receiver in conjunction with a mortgage foreclosure action.

In *Federal Farm Mortgage Corporation v. Ganser*, 146 Neb. 635, 639, 20 N.W.2d 689, 691 (1945), this court characterized a receiver relative to a mortgage foreclosure action:

> "The appointment of a receiver in a foreclosure action is ancillary to the main action. The receiver is appointed for the purpose only of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage. . . ."

(Quoting from *Wells v. Farmers State Bank of Overton*, 124 Neb. 386, 246 N.W. 714 (1933)). See, also, *Prudential Ins. Co. v. Bliss*, 123 Neb. 578, 243 N.W. 842 (1932).

In *Lackey v. Yekel*, 113 Neb. 382, 383, 203 N.W. 542 (1925), this court has stated: "Whether or not a receiver should be appointed is a matter resting in the sound discretion of the court under the conditions shown at the trial, and within the statutory limitations." See, also, *Jacobs v. Gibson*, 9 Neb. 380, 382, 2 N.W. 893 (1879):

> In the appointment of a receiver, especially in a foreclosure case, very much must be left to the discretion of the district judge, and unless it is made to appear that

> this discretion has been exercised unwisely and to the injury of the party complaining, this court will not interfere.

However, an action to foreclose a mortgage is an equity action, which, on appeal, the Supreme Court reviews de novo on the record. *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979).

The appointment of a receiver in conjunction with a mortgage foreclosure action is within the discretion of the trial court, whose decision, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. Cf. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

Thus, appointment of a receiver is an adjunct to a mortgage foreclosure action and serves to conserve the mortgaged property or apply rents and profits from the mortgaged property toward satisfaction of the indebtedness secured by the mortgage. *Keith County Bank v. Wheat Belt Pub. Power Dist.*, 226 Neb. 850, 415 N.W.2d 459 (1987); *Federal Farm Mortgage Corporation v. Ganser, supra*. A mortgagee's application for appointment of a receiver in a foreclosure action may be granted on a showing (1) the mortgaged property is in danger of being lost, removed, or materially injured, or (2) a probability exists that the mortgaged property has insufficient value to discharge the mortgage debt. § 25-1081(2). See, also, *Federal Farm Mortgage Corporation v. Ganser, supra*; *Modisett v. Campbell*, 144 Neb. 222, 13 N.W.2d 126 (1944).

Victors' second assignment of error, namely, the district court's "holding" that FLB's alleged noncompliance with federal law afforded Victors no claim or defense concerning the foreclosure action, is a misperception of the action taken by the district court. As the result of the hearing on March 5, 1986, the district court was asked to decide, and did decide, the propriety of a receiver appointed in connection with the mortgage foreclosure proceedings commenced by FLB. Consequently, the district court did not decide the merits of FLB's mortgage foreclosure action or the merits of Victors' answer and counterclaim, but merely determined, pursuant to § 25-1081(2), that appointment of a receiver was warranted

and, therefore, appointed the receiver. The remarks by the district court regarding applicability or inapplicability of the Farm Credit Amendments Act of 1985 in relation to the merits of the claims and contentions of the parties were extraneous to the question presented at the receivership hearing, that is, whether appointment of a receiver was warranted. Victors have cited no authority to support their contention that FLB's failure to follow procedures outlined in the Farm Credit Amendments Act of 1985 affords a defense to an application for appointment of a receiver. In the present case, the district court's appointment of a receiver is authorized by § 25-1081(2). We need not decide, and do not decide, whether the FLB's alleged noncompliance with federal law affords Victors a claim or defense in the foreclosure action. Consequently, we conclude and hold that FLB's alleged noncompliance with federal law is not a defense to appointment of a receiver in accordance with § 25-1081(2).

Concerning the appointment of a receiver for Victors' property, from our de novo review of the record we find no abuse of discretion by the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

NORTON, D.J., not participating.

BROKEN BOW PRODUCTION CREDIT ASSOCIATION, A CORPORATION, APPELLEE, V. WESTERN IOWA FARMS CO., A CORPORATION, DOING BUSINESS AS MACTIER COMMISSION COMPANY AND MACTIER BROS. LIVESTOCK SERVICE CO., APPELLANT.

440 N.W.2d 480

Filed June 2, 1989. No. 87-186.

1. **Actions: Livestock: Evidence: Proof.** Neb. Rev. Stat. § 54-109 (Reissue 1988) provides that in an action at law wherein the title to animals is an issue, a certified copy of the record of the registration of a brand is prima facie evidence of the ownership of the animals by the person possessing the animals.

2. **Livestock: Presumptions: Proof.** The effect of Neb. Rev. Stat. § 54-109 (Reissue 1988) is not to create a true presumption of ownership, but to shift the burden of going forward with the evidence.
3. **Livestock: Evidence: Proof: Presumptions: Words and Phrases.** "Prima facie evidence of ownership," as used in Neb. Rev. Stat. § 54-109 (Reissue 1988), means that in the absence of other evidence, proof of ownership of the brand is sufficient to constitute a prima facie case which will withstand a motion for a directed verdict on that issue; but when evidence to the contrary is introduced, any "presumption" of ownership disappears and ownership becomes a question of fact to be determined by the preponderance of the evidence.
4. **Livestock: Evidence.** Under Neb. Rev. Stat. § 54-101(2) (Reissue 1988) a certificate of brand inspection is documentary evidence of ownership of all cattle covered by such document.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions to dismiss.

Victor J. Lich, Jr., and John M. Vodra, of Lich, Herold & Mackiewicz, for appellant.

Brad Roth, of Sennett & Roth, for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

BOSLAUGH, J.

This is an action for conversion of cattle sold by the defendant, Western Iowa Farms Co., doing business as Mactier Commission Company and Mactier Bros. Livestock Service Co. The plaintiff, Broken Bow Production Credit Association (PCA), claimed a lien on the cattle under a security agreement executed by Waynard B. and Maxine L. Anderson.

The jury returned a verdict for the plaintiff in the amount of $15,261.90, and the trial court added prejudgment interest in the amount of $4,566.46. The defendant has appealed.

The record shows that on June 10, 1984, Tri- Co. Livestock Marketing Service, Inc. (Tri- Co.), shipped cattle to the Omaha stockyards that were consigned to the defendant, a commission merchant. The Andersons and their son, Daniel, own all of the capital stock in Tri- Co. The cattle which were shipped were branded with the "spear Z," or "arrow Z," brand, which is owned by the Andersons. The fact that the cattle sold by the

defendant bore the brand owned by the Andersons is the basis for the plaintiff's contention that the cattle were subject to the lien of the security agreement.

The record further shows that on June 3, 1984, the Andersons had shipped cattle to the Omaha stockyards that were consigned to the defendant, which were sold on June 5, 1984, and the proceeds sent to the Andersons. After the cattle had been sold, the plaintiff telephoned the defendant inquiring about the sale of any cattle owned by the Andersons. The defendant advised the plaintiff that a check had already been sent to the Andersons. The plaintiff requested that the plaintiff's name be included on checks from future sales of Anderson cattle.

The first question that must be determined is whether there was sufficient evidence for the jury to find that the cattle sold by the defendant on June 11, 1984, were owned by the Andersons. If the cattle were not the property of the Andersons, they were not subject to the lien of the plaintiff's security agreement.

Waynard Anderson testified by deposition that the cattle shipped to the defendant on June 10, 1984, were owned by Tri-Co., that Tri- Co. cattle were kept separate from his own cattle, and that separate records were maintained for the corporation. Tri- Co. cattle were financed by the Bank of Burwell and not by the plaintiff. Although Tri- Co. owned a brand known as "open box Z," or "three-quarter box open at the bottom Z," 99 percent of the cattle were branded with the spear Z brand because it was the clearest brand, it was well-known, and the "boys," who did 99 percent of the branding, probably were never told what brand to put on the cattle.

The bill of lading for the cattle shipped on June 10, 1984, is in evidence and shows "Tri Co. Livestock" as the owner.

When the cattle arrived in Omaha, they were not accompanied by a brand inspection certificate as required by Neb. Rev. Stat. § 54-143 (Reissue 1988). The defendant called the brand inspector in Omaha and asked him "to look very closely at that brand and make sure who owned the brand so we would have something in our records because we had been called by the PCA." The brand inspector inspected the cattle

and issued a certificate showing the cattle had been shipped by "Tri Co. Mark Ser" and that they carried the spear Z brand, which was owned by the Andersons. The certificate also had a notation: "PROCEEDS # HOLD FOR CLARIFICATION OF OWNERSHIP," which was crossed out. The brand inspector testified that he placed the notation on the certificate because the first brand book he looked at did not have a cross-reference, and he did not know that Waynard and Maxine Anderson were the president and vice president of Tri- Co. He then looked through his "supplementals" and found the cross-reference indicating that "it was one of the same people."

A certified copy of the original "Brand Inspector's Local Inspection Certificate" is in evidence. It shows the seller as "Trico Live Stock," the buyer as "Mac Tier," and the transaction authorized by "Tri Co Livestock Inc."

After the cattle had been sold, the defendant made out an account of the sale and placed a notation on it, "CHECK HELD BY BRAND INSP." After the hold had been released by the brand inspector, the notation was crossed out.

The defendant checked with the Packers and Stockyards Administration and determined that Tri- Co. was or had been a registrant under the act. The defendant then called Waynard Anderson and asked if the cattle were Tri- Co. cattle and if they had anything to do with the PCA. Anderson told the defendant that the PCA had nothing to do with these cattle and that they were financed at the Bank of Burwell. The defendant then added the Bank of Burwell to the check as a payee. The defendant's check for the proceeds from the sale of the cattle is in evidence and shows the check was deposited in the Bank of Burwell.

The defendant relies on Neb. Rev. Stat. § 54-109 (Reissue 1988), which provides:

> In all suits at law or in equity, in any criminal proceedings, or when determining the ownership of estrays as provided in subsection (21) of section 54-101 and sections 54-148, 54-150, 54-407, and 54-415, wherein the title to animals is an issue, the certified copy provided for in section 54-108, and other documentary evidence as provided in section 54-103, shall be prima facie evidence

of the ownership of such animals by the person possessing such animals.

When enacted in 1933, § 54-109 provided:

> In all suits at law or in equity, or in any criminal proceedings, wherein the title to animals is an issue, the certified copy provided for in [§ 54-108] shall be prima facie evidence of the ownership of such animal by the person whose brand or mark it may be.

In 1971, the Legislature revised the brand law and made significant changes in the language of the statute. Section 54-109 now refers to "the person *possessing* such animals" instead of the "person *whose brand or mark it may be*" as it did prior to the 1971 amendment. (Emphasis supplied.)

In *Bendfeldt v. Lewis*, 149 Neb. 107, 111, 30 N.W.2d 293, 295 (1948), we pointed out that "[t]he statute was enacted for the protection of the owners of the brands" and that "[a] brand on livestock is only prima facie evidence of ownership which may be rebutted." (Syllabus of the court.)

The effect of § 54-109 is not to create a true presumption of ownership, but to shift the burden of going forward with the evidence. "Prima facie evidence of ownership," as used in § 54-109, means that in the absence of other evidence, proof of ownership of the brand is sufficient to constitute a prima facie case which will withstand a motion for a directed verdict on that issue; but when evidence to the contrary is introduced, any "presumption" of ownership disappears and ownership becomes a question of fact to be determined by the preponderance of the evidence. See *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977).

In 1971, the Legislature also included a sentence in Neb. Rev. Stat. § 54-101(2) (Reissue 1988) that provides: "A certificate of inspection shall be construed and intended to be documentary evidence of ownership on all cattle covered by such document."

There is no evidence other than the brand to support a finding that the cattle shipped to the defendant on June 10, 1984, were owned by the Andersons. At best, the brand was but prima facie evidence of ownership "by the persons possessing such animals," not the persons who owned the brand as the statute formerly provided. All of the other evidence supports a

finding that the cattle were owned by Tri- Co. and were not subject to the lien of the plaintiff's security agreement.

We conclude that the evidence was not sufficient to support a finding that the cattle shipped to the defendant on June 10, 1984, were owned by the Andersons and subject to the plaintiff's security agreement.

It is unnecessary to consider any of the other assignments of error.

The judgment is reversed and the cause remanded with directions to enter a judgment dismissing the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SHANAHAN, J., dissenting.

It is quite unlikely that any Nebraska stockgrower views a cattle brand as a meaningless mark rather than an indelible indicator for ownership of the animal bearing its owner's brand. Since today's decision is the first for this court's construction of Neb. Rev. Stat. § 54-109 (Reissue 1988), it is also equally improbable that anyone would have imagined the legislative distortion and subversion of the patent purpose of livestock brands.

Until today, some may have believed that only Frankenstein created a monster, at least those who had never examined § 54-109 (Reissue 1988) concerning a brand in relation to ownership of cattle. This court, like a loyal laboratory lackey, has assisted in loosing the monster in cattle country.

Before enactment of 1971 Neb. Laws, L.B. 323, § 54-109 explicitly provided that a cattle brand "shall be prima facie evidence of the ownership of such [branded] animal by the person whose brand or mark it may be." § 54-109 (Reissue 1968). Thus, before 1971, Nebraska had a sensible statute pertaining to ownership evidenced by a brand, a statute similar to those in other cattle-producing states; for example, the Wyoming statute which states:

> A certified copy of any brand or mark recorded in the office of the board is prima facie evidence of ownership of animals branded or marked therewith for that species of livestock recorded by the board. The brand shall be received as evidence of ownership in all legal proceedings

involving title to the animal.

Wyo. Stat. § 11-20-108 (1977). See, also, Mont. Code Ann. § 81-3-105 (1987) (registered cattle brand is "prima facie evidence that the person, firm, or corporation entitled to use the mark or brand is the owner of animals on which it appears . . .").

In a review of the legislative history for the 1971 amendment of § 54-109, nothing reveals the anticipated improvement to be accomplished through amendment of the statute pertinent to ownership and brands, and, therefore, legislative intent regarding proof of ownership by brand is shrouded in Solonian silence. However, during a hearing before the Agriculture Committee of the Nebraska Legislature in 1971 concerning amendment of § 54-109, a representative of the Nebraska Brand Committee commented: "Over the years, as we enforced and detected violations of these [brand] laws, we've been forced to back off from any prosecution because some wording of the law makes this man technically innocent, while he has actually stolen or misappropriated someone's livestock." Agriculture Committee Hearing, L.B. 323, 82d Leg. 10 (Feb. 4, 1971). How unwittingly prophetic, for § 54-109, as amended in 1971, now provides that a cattle brand "shall be prima facie evidence of the ownership of such [branded] animals by the person possessing such animals," thereby reducing the statute to the absolute absurdity that possession is paramount proof of ownership for cattle. The Legislature's enactment of a statute bereft of rationality does not condone this court's collaboration and participation in such a legislative misadventure. Under the present § 54-109, some sidewindin' owlhoot could rustle someone's branded cattle and wind up as the owner by being caught with the critters—a result which is bad law, east or west of the Pecos, and which violates not only the Code of the Hills but common sense as well. Somebody better fetch the marshal.

Notwithstanding the nonsensical nature of § 54-109, the majority of this panel refuses to acknowledge the fundamental distinction between a presumption and prima facie proof. *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977), contains this court's elaboration of some problems involving a presumption utilized in a trial:

> A presumption is a standardized practice under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts. McCormick on Evidence (2d Ed.), § 342, p. 802. The same authority suggests that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof." Reasons for the creation of presumptions are numerous and the treatment of presumptions also differs widely. There are at least eight senses in which the term has been used by courts. The former Nebraska approach to presumptions is ordinarily referred to as the "bursting bubble" theory. Under that approach when evidence was introduced to rebut the presumption, the presumption disappeared and the burden of proof or persuasion did not shift. Under such a rule whether a particular set of basic facts gave rise to the dignity of a presumption was ordinarily not critical in the matter of instructing a jury after trial. What was many times referred to as a "presumption" was often merely a permissible or probable inference, or was a method of indicating that the evidence was sufficient to withstand a motion for a directed verdict or to constitute a prima facie case.

197 Neb. at 603, 250 N.W.2d at 238.

Thus, a presumption is an assumption of fact required to be made from another fact or group of facts found or otherwise established in an action. For that reason, a presumption is procedurally and evidentially distinct from prima facie proof inasmuch as prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict on the issue. See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

> The prima facie case is used by the trier of law to decide whether a case is directed out of court at the close of the plaintiff's evidence or, instead, is suitable for the trier of fact. The presumption, on the other hand, is used by the trier of fact. When the trier of law finds that a presumption applies, it is passed along to the trier of fact.

Fenner, *About Presumptions in Civil Actions*, 17 Creighton L. Rev. 307, 312 (1984). The all-too-obvious point is that § 54-109

expressly relates to prima facie proof and does not mention or effect a presumption concerning ownership of cattle. Nevertheless, the majority of this court fails to discern the distinction between a presumption and prima facie proof.

The majority of the judicial panel reviewing this case attempts to support its position by underlining and emphasizing the peculiar language in § 54-109, namely, "the person *possessing* such animals." All the judicial underlining or underscoring cannot infuse intelligibility into an incomprehensible statute or absolve a statute of its profound absurdity.

If we accede to reason, as a court should, and put aside the legislative fiasco found in § 54-109, the evidence adduced in this case is sufficient to sustain the verdict for Broken Bow Production Credit Association. Without objection or restrictive purpose, exhibit 22, a copy of the "Brand Inspectors Local Inspection Certificate 38727 A16," was received in evidence, establishing that the Anderson Ranch at Milburn, Nebraska, was the inspection point for the cattle in question and designating "Trico Live Stock/Anderson Ranch" as the seller of the 30 heifers later sold by Mactier. As expressed in the brand inspector's certificate, the 30 heifers sold by Mactier bore the "↟Z" brand on their left shoulders. Additionally, again without objection or restriction, exhibit 21, a copy of the "Inspectors Tally and Local Certificate," identified the cattle sold by Mactier as follows:

HFRS.	STEERS	BULLS	BRAND	OWNER	ADDRESS
30			↟Z ls	Waynard and Maxine Anderson	Milburn

The brand inspection certificates must be read in the light of Neb. Rev. Stat. § 54-101(2) (Reissue 1988), which in pertinent part provides: "A certificate of inspection shall be construed and intended to be documentary evidence of ownership on all cattle covered by such document." Undeniably and unfortunately, the majority of this court has overlooked, or elected to disregard, the presence of "Anderson Ranch" as a

seller and owner of the cattle designated in the brand inspectors' certificates. Also, Broken Bow PCA called James Pearman, a brand inspector for the Nebraska Brand Committee, who testified that "Waynard B. and Maxine Anderson" were the owners of "spear bar Z brand" on the cattle sold by Mactier and acknowledged that "the cattle were owned by Waynard and Maxine Anderson."

Consequently, there were exhibits and testimony that Andersons owned the cattle sold by Mactier. Such evidence required the district court to submit the Anderson ownership issue to the jury. By judicial alchemy in reverse or gone awry, the majority of this panel has transformed evidential gold into a base substance worthless for the jury's consideration. Whatever the ultimate weight of evidence placed before the jury, that evidence convinced a jury of 12 at the trial level, but, on appeal, the jury has increased to 16, resulting in an oligarchic verdict through the appellate process. The evidence supports the jury's finding that Andersons owned the cattle in question and necessitates affirmance of the verdict for Broken Bow PCA.

WILLIAM C. JENNINGS, APPELLANT, V. GINA C. DUNNING, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES, ET AL., APPELLEES.

440 N.W.2d 671

Filed June 2, 1989. No. 87-329.

1. **Administrative Law: Appeal and Error.** The Supreme Court's review of an administrative agency's decision is de novo on the record. As such, we make independent findings of fact without reference to those made by the agency whose action is being reviewed.
2. **Administrative Law: Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice.
3. **Estoppel.** The elements of equitable estoppel must be established by clear and convincing evidence. Those elements are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to

assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed as modified.

Neil B. Danberg, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Robert M. Spire, Attorney General, and Royce N. Harper for appellees.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

ROWLANDS, D.J.

This is an appeal from a denial of medical assistance benefits to appellant, William C. Jennings, by the Department of Social Services (DSS) and its director.

On November 10, 1984, Jennings was severely burned in a fire at his mother's home. He was taken to St. Joseph Hospital in Omaha, where he was treated for burns over 80 percent of his arms. Jennings remained in the hospital, primarily in the intensive care unit, for over 2 months until January 14, 1985. The hospital bill amounts to approximately $200,000.

William Jennings had been separated from his wife, Ramona, for over 2 years prior to the accident. Ramona Jennings had filed her petition for dissolution of marriage in Douglas County District Court on October 30, 1984. During the period of separation, William Jennings had not contributed to the support of his wife or minor children.

After his discharge from the hospital, William Jennings resumed living with his wife. Whether this was a permanent arrangement, or one of convenience during recuperation, is not clear from the record. The regulations and practice of the Douglas County office of DSS required an application for medical assistance benefits to be made at its 42d Street office.

Jennings was unable to travel, so his wife and Michael Davis, an entitlement counselor at St. Joseph Hospital, went to the DSS office on February 6, 1985, to file a medicaid application for aid to the aged, blind, or disabled (AABD).

At the conclusion of the application process, it was Davis' understanding that only William Jennings' birth certificate and Social Security card were necessary to complete the application.

DSS caseworker JoAnn Ragan testified, to the contrary, that she requested additional information from Ramona Jennings. When this information was not forthcoming, Ragan denied the application on March 29, 1985, and she sent a notice of denial to Ramona Jennings but not to Davis. However, on April 4, 1985, Ramona Jennings called and asked for more time to obtain the documents. Ragan advised Ramona Jennings that she would hold the record until Monday and, more significantly, admitted during questioning at the administrative hearing that she told Ramona Jennings that if she had trouble getting this information, if Ramona Jennings would call back, "I would again reopen the case and try to determine her eligibility."

Davis did not find out the application had been rejected until May 9, 1985. On that date he called Ragan and was advised that she had considered the resources of both spouses together. She stated that she could not determine eligibility because Ramona Jennings' resources could not be ascertained and that William Jennings' wages could not be determined.

Ragan did not keep notes of her conversation with Davis, but Davis did. Davis' entry on May 9, 1985, reads: "Case can be reopened if documentation provided."

On May 23, 1985, Davis took Ramona Jennings to the DSS office and met a second worker named Terry Lorenzen. Bank statements were delivered to Lorenzen. Davis testified that Lorenzen indicated he thought he could get benefits back to November 1, 1984.

Davis' notes from the May 23, 1985, meeting contain the following entry: "He said he should be able to get medical back to 11-1-84. He said it will take until 6-30-85."

At the administrative hearing Lorenzen did not deny Davis' testimony, but stated he told Ramona Jennings and Davis that

there would be a possibility of reopening the case if additional information was provided. Lorenzen admitted that he did not inform either Davis or Ramona Jennings that the appeal time was running on the March 29, 1985, rejection.

On June 26, 1985, DSS advised William Jennings and, on July 7, 1985, advised Davis, that the supplemental application had been denied because DSS believed that both spouses' resources should be considered together, and there was insufficient information for a "prudent person" to determine eligibility.

William Jennings filed his appeal on July 18, 1985. A contested administrative hearing was held October 3, 1985. On November 27, 1985, the director of DSS affirmed the total denial of medical benefits. The application of February 6, 1985, was rejected because William Jennings did not file his appeal within 90 days of March 29, 1985. The denial of the supplemental or second application was affirmed for the reasons stated by the Omaha office of DSS as set forth in the preceding paragraph.

Jennings filed an appeal in the Douglas County District Court, which affirmed the findings and decisions of DSS on January 28, 1987. A motion for new trial was denied March 18, 1987, and this appeal followed.

For the reasons set forth below, we affirm that portion of the district court's denial of benefits after January 14, 1985, but modify the decision so as to award complete medicaid AABD benefits from November 10, 1984, to January 14, 1985.

The standard of review in this proceeding is de novo on the record, and this court makes independent findings of fact without reference to those made by the agency whose action is being reviewed. Neb. Rev. Stat. § 84-918 (Reissue 1981); *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986); *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988).

Our review of the record convinces us that the appellant was clearly entitled to medical assistance benefits during his period of hospitalization. 469 Neb. Admin. Code, ch. 2, § 2-006 (1984) provides: "In the case of a bona fide separation, legal separation, or divorce, the resources and income of each are

considered individually."

The evidence is overwhelming that William Jennings and his wife, Ramona, had been separated for over 2 years prior to the unfortunate fire of November 10, 1984. Ramona Jennings supported herself and her minor children during that extended period of time, and she had a petition for dissolution of marriage pending in Douglas County District Court when William Jennings was tragically burned. Likewise, the record is clear that William Jennings had so little income in 1984 that he was not required to file a tax return. Appellant's claim for medical benefits during his hospitalization must be granted unless he has failed to timely perfect an appeal.

DSS relies on 469 Neb. Admin. Code, ch. 1, § 1-007 (1985), which requires an appeal to the director within 90 days of any denial of benefits. The director contends the February 6, 1985, application was denied March 29, 1985, and no appeal was filed until July 18, 1985. Because of the positive representations made to both Ramona Jennings and Mike Davis by employees of DSS that the application would be held open, the taking of additional information and receipt of documents after March 29, 1985, and the reasonable reliance on those statements to the detriment of William Jennings, we hold that the appellees are equitably estopped from claiming that two separate and distinct applications were taken in this matter.

In general, it may be said that estoppel is a bar which precludes a party from denying or asserting anything to the contrary of that which has been established as the truth by his own deed, acts, or representations, either express or implied. 28 Am. Jur. 2d *Estoppel and Waiver* § 1 (1966). As this court stated in *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 653-54, 139 N.W.2d 821, 828-29 (1966):

> " 'So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. . . . The following, however, may

> be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' . . ."

See, also, *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988).

The elements of equitable estoppel must be established by clear and convincing evidence. Those elements are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985); *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, 217 Neb. 39, 348 N.W.2d 418 (1984); *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988).

We recognize that the doctrine of equitable estoppel should not be lightly invoked against the State. However, the prior decisions of this court make it clear that the State of Nebraska or one of its political subdivisions may be subject to the doctrine of equitable estoppel under compelling circumstances where right and justice so demand in the interest of preventing a manifest injustice. *County of Scotts Bluff v. Hughes*, 202 Neb. 551, 276 N.W.2d 206 (1979); *Warren v. Papillion School Dist. No. 27*, 199 Neb. 410, 259 N.W.2d 281 (1977); 28 Am. Jur. 2d, *supra*, § 123; *Osmera v. School Dist. of Seward*, 216 Neb. 261,

343 N.W.2d 886 (1984).

In this particular case, we believe that manifest injustice would result if appellant were to be denied medical benefits after Ramona Jennings and Davis were assured on two separate occasions that the rejection of March 29, 1985, would be reconsidered if additional documents were delivered to DSS. Their reliance on these assurances was reasonable and in good faith, and William Jennings changed his position to his detriment by delaying an appeal until the matter was finally determined in June of 1985.

With reference to the claim for benefits after William Jennings resumed living with his spouse, a different situation arises. Section 2-006 set forth above, requiring separate consideration of income and resources of spouses, becomes inapplicable, and 469 Neb. Admin. Code, ch. 1, § 1-010 (1984) controls, wherein it provides that when the statements of the client are incomplete, unclear, or inconsistent, or when other circumstances in the particular case indicate to a prudent person that further inquiry must be made, the worker shall obtain additional verification before eligibility is determined. It is further provided under 469 Neb. Admin. Code, ch. 1, § 1-006 (1985), that the client has the primary responsibility to provide complete and accurate information.

The record reflects that Ramona Jennings had a savings account and a line of credit indicating she was the owner of a car sales business. Three vehicles were registered in her name. She lived in a large residence with three garages, and there was an automobile repair shop with a tow truck on the premises. DSS had a valid reason to be concerned about the combined resources of Ramona and William Jennings after they resumed cohabitating as husband and wife. A reasonable or prudent person had the right and duty to demand clarification or additional information. When this information was not supplied by either William or Ramona Jennings, or by Davis, the May 23, 1985, application was properly denied as to medical assistance benefits after William Jennings left the hospital and resumed living with his wife.

AFFIRMED AS MODIFIED.

NORTH PLATTE, NEBRASKA HOSPITAL CORPORATION, A NONPROFIT CORPORATION, APPELLANT, V. CITY OF NORTH PLATTE ET AL., APPELLEES.

440 N.W.2d 485

Filed June 2, 1989. No. 87-605.

1. **Collateral Attack: Special Assessments: Fraud: Jurisdiction.** A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction.
2. **Collateral Attack: Special Assessments: Evidence.** To sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the particular improvement.
3. **Collateral Attack: Special Assessments.** Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment.
4. **Special Assessments: Evidence.** Future use of property subject to a special assessment is an element which may be considered in determining the amount of special benefit.
5. **Equity: Collateral Attack: Special Assessments: Appeal and Error.** A collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Leonard P. Vyhnalek for appellant.

James P. Mueller, North Platte City Attorney, for appellees.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

RONIN, D.J., Retired.

This is an action brought by the plaintiff, North Platte, Nebraska Hospital Corporation (Hospital), property owner, to have special assessments levied against its property by the defendant City of North Platte, Nebraska, and its officials be declared null and void, and to enjoin the collection of the assessments. Trial was held in the district court for Lincoln County, Nebraska. The trial court entered its order finding for the defendants and dismissing the plaintiff's third amended petition. The plaintiff's motion for new trial was thereafter overruled, and plaintiff Hospital timely appealed. For the reasons stated hereinafter, we affirm.

STATEMENT OF FACTS

In June 1973, the Hospital purchased about 17 acres of undeveloped land in North Platte, Nebraska, with the intent of building a hospital complex. A 130-bed hospital was built in the approximate center of this tract between 1973 and 1975. Both water and sanitary sewer services were obtained by running pipes to existing city lines running along Francis Street bordering the north edge of the Hospital's property. The Hospital was not assessed at that time for either water or sewer service.

In 1978, the Hospital built another building called the Medical Arts Building to the west of the original hospital, which contains facilities which coordinate medical and health services with the Hospital. In 1979, the northeast corner of the Hospital's property was leased to the Red Cross, and a building was constructed and occupied there. The Medical Arts Building is being expanded to handle a linear accelerator, which will provide radiation therapy. The remainder of the Hospital tract has either parking areas or is undeveloped.

The Centennial Park Plaza Development Company (Centennial) planned and has constructed a medical office building and home for the elderly on its land immediately south of the Hospital tract, with Leota Street separating Centennial's and the Hospital's property. At the request of Centennial, under the authority of Neb. Rev. Stat. § 18-401 (Reissue 1987), the City of North Platte created by ordinances sewer extension district No. 271 and water extension district No. 162. In accordance with Neb. Rev. Stat. § 18-405 (Reissue 1987), the city employed the "front footage" method of assessment.

Water extension district No. 162 consists of a new 8-inch main placed along Leota Street from Oak Street to Willow Street, which includes the entire south boundary of the Hospital tract and the entire north boundary of the Centennial tract. As a part of the water extension district, two new fire hydrants were placed near the center of the Hospital tract's south property boundary. The Hospital was assessed the sum of $8,253.01 for these improvements.

Sanitary sewer extension district No. 271 consists of a new 8-inch sanitary sewer main installed on both the entire east and

south sides of the Hospital tract, for which improvement the Hospital was assessed the sum of $10,441.40.

PROPOSITIONS OF LAW

The parties agree that this action constitutes a collateral attack upon both the subject water and sewer special assessments against the property of the Hospital, and is not a direct appeal from the city ordinances of the City of North Platte authorizing the establishment of the subject water and sewer extension districts, as required by Neb. Rev. Stat. § 19-2422 (Reissue 1987). A property owner may collaterally attack a special assessment only for the limited purposes of fraud, actual or constructive, a fundamental defect, or want of jurisdiction. *Grube v. City of Ogallala*, 223 Neb. 640, 392 N.W.2d 380 (1986).

Where it is alleged and proven that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and may be subject to collateral attack. *Grube v. City of Ogallala, supra*; *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977); *Midwest Development Corp. v. City of Norfolk*, 192 Neb. 475, 222 N.W.2d 566 (1974); *Wead v. City of Omaha*, 124 Neb. 474, 247 N.W. 24 (1933).

Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. All defects, irregularities, and inequalities in the making of an assessment, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. *Nebco, Inc. v. Speedlin, supra*; *Midwest Development Corp. v. City of Norfolk, supra*; *Wiborg v. City of Norfolk*, 176 Neb. 825, 127 N.W.2d 499 (1964).

Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. *Nebco, Inc. v. Speedlin, supra.*

Several witnesses, including North Platte's city engineer, its

fire chief, and a registered engineer expert witness testified that the Hospital received special present and likely future benefits from both the subject water and sewer improvements. These special benefits included enhanced fire protection by reason of the closer location of the two fire hydrants at the south entrance to the Hospital building, better water flow, and less firehose layout. Evidence was also adduced that the new sewerline provided additional service and would be available if additional buildings would be added at a later time.

The Hospital cites the case of *Grube v. City of Ogallala, supra*, in support of its contention that the Hospital would not receive any special benefit from either the subject water or sewer improvements. However, there is a factual difference in the *Grube* case in which the tract was undeveloped agricultural land irrigated by a center pivot which would not be specially benefited by the proposed improvements. In contrast, the Hospital tract had already been commercially developed and had a history of continuing growth as a medical center, with a potential for further health care related services in North Platte.

A collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. *Grube v. City of Ogallala, supra.*

It is a question of fact whether or not a property which has been specially assessed has or will benefit from an improvement project. *Nebco, Inc. v. Speedlin, supra.* The district court was correct in finding in this case that the physical facts are such that the Hospital's property has specially benefited from the improvements of the districts. The order of the district court is affirmed.

AFFIRMED.

WIEKHORST BROTHERS EXCAVATING & EQUIPMENT CO., A PARTNERSHIP, APPELLEE, V. SANITARY AND IMPROVEMENT DISTRICT NO. 337 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.

440 N.W.2d 488

Filed June 2, 1989. No. 87-765.

Evidence: Records: Appeal and Error. If a bill of exceptions of an arbitration hearing is not offered into evidence in the district court, that evidence will not be considered by this court.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

John A. Rickerson, of Rickerson, Welch & Kruger, for appellant.

Dan D. Stoller for appellee.

Herbert M. Fitle, Omaha City Attorney, and Robert J. Hamer for amicus curiae City of Omaha.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

Sanitary and Improvement District No. 337 (S.I.D.) appeals a $249,363 arbitration award which it was ordered to pay to Wiekhorst Brothers Excavating & Equipment Co., a partnership (Wiekhorst).

The award arose out of a sewer construction contract dispute between the S.I.D. and Wiekhorst. The original arbitration award was modified and then confirmed by the Douglas County District Court. Judgment for the award and costs was entered accordingly. We affirm the district court's judgment.

Wiekhorst contracted to perform work on a sewer project for the S.I.D. The written contract provided that in the event of a dispute between the parties, the matter would be submitted to binding arbitration before arbitrators of the American Arbitration Association (A.A.A.) under the Construction Industry Arbitration Rules (Jan. 1, 1986). The S.I.D. terminated the contract because it claimed that Wiekhorst was performing its work defectively. Before the arbitration panel,

Wiekhorst sought (1) reinstatement to the contract and the right to correct defective work, or (2) compensation for the work it performed and lost profits.

After considering added items claimed by Wiekhorst and offsets claimed by the S.I.D., the arbitration panel found that Wiekhorst was entitled to a total of $267,615. The panel further found that the S.I.D. had paid Wiekhorst $18,252 prior to terminating the contract and that the unpaid amount due Wiekhorst was $249,363. The panel also assessed 12 percent interest compounded annually on the unpaid amount due from November 4, 1986. Wiekhorst petitioned the Douglas County District Court for confirmation of the award. The award was confirmed after modification to provide for simple, rather than compound, interest.

At the district court hearing, only four exhibits were offered into evidence: (1) the agreement to arbitrate, (2) the arbitration panel's findings and award, (3) an affidavit of the plaintiff's attorney, and (4) an affidavit of the defendant's attorney. The record does not reflect that testimony, exhibits, or other evidence before the arbitration panel was offered or received in evidence in the district court. The court reporter's certificates indicate that preparation of the arbitration hearing record was first requested when the S.I.D. filed its appeal to this court.

If a bill of exceptions of an arbitration hearing is not offered into evidence in the district court, that evidence will not be considered by this court. See, *Scottsbluff Typewriter Leasing v. Beverly Ent.*, 230 Neb. 699, 432 N.W.2d 844 (1988); *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976).

In the record before us, there is evidence regarding only one of appellant's four assigned errors: that the arbitration hearing proceeded erroneously.

Originally, three arbitrators were selected to hear this dispute. The day before the hearing was to commence, it was announced that two of the arbitrators were unable to serve on the panel. One substitute was selected by the A.A.A. The hearing was held as scheduled, over the S.I.D.'s objection, with one arbitrator from the original panel and the newly selected arbitrator. The S.I.D. claims that proceeding with the hearing before the panel as finally constituted was error.

Article 16 of the contract between the parties provides that disputes will be submitted to arbitration in accordance with the Construction Industry Arbitration Rules of the A.A.A. A copy of those rules is attached to exhibit 1, the award by the arbitration panel.

Rule 20 concerns vacancies on an arbitration panel. In the event of a vacancy, rule 20 requires that the hearing proceed with the remaining arbitrators unless both parties agree otherwise.

Rule 13, dealing with the appointment of arbitrators, gives the A.A.A. authority to appoint new arbitrators if those selected are unable to act. Rule 17 provides that disputes be heard by one arbitrator unless the A.A.A., in its discretion, directs otherwise.

The record does not show a violation of any of the above rules. The appointment of a replacement arbitrator, proceeding as scheduled, and proceeding with two rather than three panel members are all permitted by the A.A.A. rules.

The S.I.D.'s fourth assigned error is without merit.

Because the record of the arbitration hearing is not before this court, the other assigned errors cannot be considered. The only remaining issue is the sufficiency of the pleadings to support the judgment. *Scottsbluff Typewriter Leasing v. Beverly Ent., supra*; *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

After review of the pleadings and the exhibits properly before this court, we find that the judgment of the district court is correct.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLADYS HORR, APPELLANT.

441 N.W.2d 139

Filed June 2, 1989. No. 88-250.

1. **Criminal Law: Sentences: Time: Appeal and Error.** Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1988) permits a sentencing court to reduce its sentence within 120 days of the date it receives the mandate of the appellate court, even if that mandate affirms the sentence as imposed.
2. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court.
3. _____: _____: _____. Upon appeal from a county court in a criminal case, the district court's review is limited to an examination of the county court record for error or abuse of discretion.
4. **Sentences: Courts: Appeal and Error.** Upon an appeal from a county court in a criminal case, the district court may modify a sentence imposed by the county court only where the county court has abused its discretion so as to render its sentence an error upon the record presented.
5. **Motions for New Trial: Courts.** In cases tried before the county court, a motion for new trial based on newly discovered evidence is to be presented to the county court as the fact finder, not to the district court which sat as an appellate court.
6. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.
7. **Courts: Appeal and Error.** The district court's only power and jurisdiction upon receipt of the Supreme Court's mandate is to enter judgment in accordance with that mandate and, if it served as an intermediate court of appeals, to issue its own mandate directing the inferior court to act in accordance with the district court's mandate.
8. **Courts: Jurisdiction: Appeal and Error.** The Supreme Court's mandate reinvests the court from which the appeal was taken with jurisdiction.
9. **Sentences: Appeal and Error.** The question of whether a sentence is to be reduced under the provisions of Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1988) is within the discretion of the sentencing court, and absent an abuse of discretion, its ruling with respect thereto will not be disturbed on appeal.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded with direction.

Maurice S. Redmond for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

PER CURIAM.

The defendant, Gladys Horr, appeals and, in summary, assigns as error the district court's vacation of the county court's reduction of the sentence the county court had imposed earlier. We reverse and remand with direction.

Horr pled guilty in the county court to attempted violation of custody, contrary to the provisions of Neb. Rev. Stat. §§ 28-201 and 28-316 (Reissue 1985). She was later, on January 21, 1987, sentenced to serve 6 months in the county jail. She appealed to the district court, which found the sentence not to be excessive. Horr next appealed that district court judgment to this court. We affirmed pursuant to Neb. Ct. R. of Prac. 7A(1) (rev. 1988). *State v. Horr*, 227 Neb. xix (case No. 87-564, Dec. 9, 1987). In due course, on December 17, 1987, this court issued a mandate directing the district court to enter judgment in conformity with this court's judgment and opinion.

The district court's journal entry recites that the matter came on for hearing on December 21, 1987, at which time Horr moved for reduction of sentence. The district court denied the motion and ordered that since the previously entered district court judgment was in accordance with this court's mandate, Horr be remanded to the sheriff "to commence her sentence" and that her motion for a reduced or suspended sentence be denied. Although the record does not tell us when such was done, it does tell us that the county court received a certified copy of this court's mandate, as well as received a certified copy of the district court's journal entry on December 30. The record does not tell us who presented those documents to the county court.

On December 31, 1987, Horr filed a motion in the county court, seeking a reduction of her sentence pursuant to Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1988), which provides in part: "Any court which imposes a sentence for a criminal offense may reduce such sentence within one hundred twenty days after (1) the sentence is imposed or probation is revoked or (2) receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal." Following a hearing, the county court, on February 22, 1988, reduced the 6-month sentence of incarceration it had previously imposed to a period

of 4 months. Raising no question as to whether the foregoing statute presents any constitutional problem, see *State v. Hunter*, 447 A.2d 797 (Me. 1982), the State then appealed to the district court, which vacated the sentence reduction ordered by the county court. The district court reasoned that as it had previously denied a like motion, the county court lacked jurisdiction to reduce the sentence.

Horr contends the district court lacked jurisdiction to consider the motion she mistakenly presented to it on December 21, 1987; that, instead, the county court, as the sentencing court, was the only court empowered to consider such a motion. The first question presented to this court, then, is one of law; namely, which court, if either, had subject matter jurisdiction to consider Horr's motion to reduce the sentence the county court imposed on January 21, 1987.

This court had long held that a sentence validly imposed by a sentencing court takes effect from the time the sentence is imposed, so that any subsequent different sentence is a nullity. *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988); *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986). Section 29-2308.01 obviously modifies that rule; we have held the statute "grants to those sentenced pursuant to a criminal conviction the right to petition the sentencing court for reconsideration of the sentence." *State v. Spotted Elk*, 227 Neb. 869, 875, 420 N.W.2d 707, 712 (1988). While the sentencing court has no jurisdiction over a cause pending in an appellate court, *State v. Spotted Elk, supra*, § 29-2308.01 permits a sentencing court to reconsider its sentence within 120 days of the date it receives the mandate of the appellate court, even if that mandate affirms the sentence as imposed.

We have held that upon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988); *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987); *State v. Daniels*, 224 Neb. 264, 397 N.W.2d 631 (1986); *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987). Under such a circumstance, the district court's review is limited to an examination of the county court record for error or abuse of discretion. *State v. Sock, supra*. Further, we have

held that the district court may, on appeal, modify a sentence imposed by the county court only where the county court has abused its discretion so as to render its sentence an error upon the record presented. *State v. Sock, supra*; *State v. Thompson, supra*. Finally, in *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984), we held that in cases tried before the county court, a motion for new trial based on newly discovered evidence is to be presented to the county court as the fact finder, not to the district court which sat as an appellate court.

Because the county court, as the sentencing court, is the proper court to reconsider Horr's sentence, the district court erred in entertaining Horr's motion asking it to reduce her sentence, and further erred in determining in the second appeal that the county court lacked jurisdiction to consider the motion for sentence reduction Horr presented to the county court. It is, of course, no answer that Horr had asked the district court to reduce her sentence, as parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent. *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987). See, also, *Wick v. United States*, 290 F. 191 (8th Cir. 1923).

Upon receipt of this court's mandate of December 17, 1987, the district court's only power or jurisdiction was to enter judgment in accordance with that mandate and issue its own mandate to the county court directing that court to enter judgment in conformity with the district court judgment. See, *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986); *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 357 N.W.2d 455 (1984). In the absence of any other directive, the filing in the county court of a certified copy of this court's mandate and of the district court's journal entry, no matter by whom, was the functional equivalent of filing in the county court the district court mandate and, thus, reinvested the county court with jurisdiction of the case. See *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950), which declares that the Supreme Court's mandate reinvests the district court with jurisdiction.

In this instance, the rather remarkable failure of the record to show when the certified copy of this court's mandate was filed

with the county court is immaterial, for the record reveals that the county court reduced Horr's sentence within 67 days of this court's mandate, necessarily meaning that the county court acted within 120 days of the time it reacquired jurisdiction by receiving the documents constituting the functional equivalent of the district court's mandate, and thus acted within the time limited by § 29-2308.01.

In view of the foregoing resolution, the inquiry becomes whether the county court's reduction of the sentence it originally imposed is, as the State claims, erroneous.

The evidence adduced in connection with Horr's county court motion convinced the county court that Horr recognized she had been wrong in violating the law, that she was contrite, remorseful, and apologetic, and that her family was having difficulty coping without her. Just as the sentence to be imposed upon initial consideration is within the sentencing judge's discretion, *State v. Jones*, 230 Neb. 528, 432 N.W.2d 523 (1988), so, too, is the question of whether the sentence imposed is to be reduced under the provisions of § 29-2308.01 within the discretion of the sentencing court, and absent an abuse of discretion, its rulings with respect thereto will not be disturbed on appeal. The record contains nothing which enables this court to say the reduction in this case constituted an abuse of discretion.

Accordingly, the district court judgment vacating the sentence reduction ordered by the county court is reversed and the matter remanded with the direction that the district court enter judgment in accordance with this opinion and issue its mandate to affirm the county court judgment.

REVERSED AND REMANDED WITH DIRECTION.

CAPORALE, J., dissenting.

I respectfully dissent; it seems to me that a criminal defendant ought not be able to have the excessiveness of his or her sentence reviewed by this court and then, upon its affirmance, ask the sentencing court to reconsider the sentence and reduce it. A defendant who puts the sentence at issue before an appellate court should be treated as having waived any right for later reconsideration of the sentence by the inferior sentencing court; once an appellate court passes upon a

sentence, the sentence should be treated as the judgment of that court, and the only power an inferior court should acquire over it is to enforce it as affirmed. See *In re Caruba*, 142 N.J. Eq. 358, 61 A.2d 290 (1948), *cert. denied* 335 U.S. 846, 69 S. Ct. 69, 93 L. Ed. 2d 396. See, also, *State v. Kowalczyk*, 3 N.J. 231, 69 A.2d 718 (1949); *Stowe v. Superior Court*, 72 Cal. App. 174, 236 P. 985 (1925).

Under the statutory interpretation announced today, a criminal defendant will be able first to ask this court to review his sentence and, if we find it to be not excessive, later ask us to review the sentencing court's subsequent refusal to reduce it. In my view, such a result makes no procedural sense and is not compelled by the statutory language.

The provision of Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1988) empowering a sentencing court to reduce its sentence "within one hundred twenty days after . . . receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal" does not address cases in which the sentence has been called into question before the appellate court. As I read the statute, it contemplates that a sentencing court retains power to reduce a sentence after appellate review only if sentencing issues were not put before the appellate court. Thus, sentencing issues would be reviewed by this court once and only once. I submit that such a construction is logical and fulfills our obligation to construe a statute as if the Legislature intended a sensible, rather than an absurd result. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

STATE OF NEBRASKA, APPELLEE, V. CARL A. MARTIN, APPELLANT.

440 N.W.2d 676

Filed June 2, 1989. No. 88-304.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.

2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motions.
3. **Arrests: Search and Seizure: Words and Phrases.** A pretext arrest is one where the arrest is only a sham, a front being used as an excuse for making a search.
4. **Arrests: Appeal and Error.** The determination of whether an arrest is pretextual is a question of fact for the trial court. This court will not reverse a trial court's finding on this question unless the finding is clearly erroneous.
5. **Lesser-Included Offenses: Evidence: Jury Instructions: Appeal and Error.** When the evidence entirely fails to show an offense of a lesser degree than that charged in the information, it is not prejudicial error to omit to give an instruction defining an offense of such lesser degree.
6. **Lesser-Included Offenses: Evidence: Jury Instructions.** Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense.
7. **Appeal and Error.** Assignments of error not discussed are not considered by this court.
8. **Robbery: Evidence: Proof.** The taking of property in a robbery need not be from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control.
9. **Sexual Assault: Words and Phrases.** "Serious personal injury," in Neb. Rev. Stat. § 28-319(2) (Reissue 1985), includes extreme mental anguish or mental trauma.
10. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

CARLSON, D.J.

On September 4, 1987, an information was filed in the Lancaster County District Court charging the defendant-appellant, Carl A. Martin, with three counts of first degree sexual assault, under Neb. Rev. Stat. § 28-319(1)(a)

(Reissue 1985); two counts of using a knife to commit a felony, under Neb. Rev. Stat. § 28-1205(1) (Reissue 1985); and one count of robbery, under Neb. Rev. Stat. § 28-324(1) (Reissue 1985). Defendant pleaded not guilty to all charges, and the case was set for a jury trial. Motions to suppress statements and evidence were filed, which after a hearing the court overruled. A multiple-day jury trial was held, and the jury returned verdicts of guilty on each of the six counts.

The court ordered a presentence investigation and evaluations to determine whether the defendant was a mentally disordered sex offender. The defendant was adjudged to be a nontreatable mentally disordered sex offender and was then sentenced to indeterminate terms of incarceration as follows: 16 2/3 to 50 years on each of the first degree sexual assault charges, 16 2/3 to 50 years on the robbery charge, and 6 2/3 to 20 years on each of the weapons charges. Each sentence was to be served consecutively. The defendant appealed to this court.

The defendant's assignments of error can be summarized as claiming: (1) The court erred in overruling defendant's motions to suppress statements and evidence; (2) the court erred in refusing to instruct the jury on the lesser-included offense of attempted first degree sexual assault on count III; (3) the court erred in refusing to instruct the jury on the lesser-included offense of theft on count V; (4) the court erred in overruling defendant's objection to instruction No. 11 in regard to the robbery count; (5) the court erred regarding the finding of serious personal injury based on the evidence in the three first degree sexual assault charges; and (6) the court erred and abused its discretion in imposing excessive and disproportionate sentences.

THE FACTS

The background for the six counts is extensive, but we must examine some of the facts on each count to resolve the questions of error. In count I, the prosecutrix testified that in the late evening of July 21, 1987, as she was driving home in Lincoln, Nebraska, a man sat up in the back seat of her car and put his left arm around her shoulders and his right hand up to her neck. The defendant stated, "[D]on't move or I'll cut your

throat," and she said, "[P]lease don't hurt me." He told her he wanted money, and after driving for some time, she was directed to a parking lot of an elementary school. The defendant put a sweatshirt over her face, told her to remove her shoes, and tied her wrists together.

After they got out of the car, the defendant told her he wanted to have sex with her and to lie down. The defendant pulled up her shirt and rolled her over on her side. The prosecutrix asked the defendant not to have anal intercourse, and he said he would not. The defendant attempted to penetrate her anally with his finger, but she told him it hurt, so he stopped. The defendant subjected the prosecutrix to vaginal intercourse while she was still tied with her eyes covered. When they returned to her car, the defendant untied her wrists. They drove to another area where the defendant got out and returned $2 he had taken from her earlier.

The prosecutrix went to her boyfriend's apartment and told him what had happened. The police were called and she went to the hospital for an examination. The prosecutrix had marks on her wrists which caused her discomfort and a number of superficial abrasions on her back and buttocks. The doctor who examined her testified that she did not have any injury or trauma to her vaginal area.

The prosecutrix in count II testified that on July 29, 1987, at 14th and Garfield Streets in Lincoln, Nebraska, at about 10:30 p.m., she was returning to her car after a trip to Omaha. The defendant approached the car and asked for a ride to Malone Community Center, to which she agreed. When they arrived at the center, the defendant attempted to give her money and then directed the prosecutrix into a nearby alley. The prosecutrix tried to leave the alley but the defendant stopped her. The defendant then forced her out of the car, and she screamed for help. The defendant pushed her to her knees and began to choke her. The defendant told her to remove her clothes, ripped the shirt she had been wearing, and blindfolded her with it. He then told her to lie down on the ground. He removed his clothing and lay down on top of her. He directed her to rub his penis until he had an erection, and he attempted unsuccessfully to penetrate her vagina with his penis frontally and from the

rear. He led her to another area and was successful in penetrating her vagina with his penis.

After these acts, he tied her wrists with a nightgown and had her lie down in the back seat of the car. The defendant drove to 16th and South Streets, told her to count to 25, and left.

At trial the prosecutrix testified that as a result of the assault she received abrasions on her back and bruises on her legs. There was no trauma noted on the pelvic examination. As to the choking, the victim testified she could not breathe, she was gasping for air, and she could not get air into her lungs. In response to questions, the victim testified, "I could picture myself . . . like being found, like dead somewhere, with my parents having to come find me and seeing myself dead and not believing that — not believing that it was happening," and, when counting, "I saw myself like getting up out of the back of the car and him still being there and him being there and ready to kill me."

In counts III and IV, a first degree sexual assault count and use of a knife to commit a felony count, the prosecutrix-victim went to a laundromat on the morning of August 7, 1987. Another woman had been present but, at some point, the victim was alone with the defendant, who came up behind her, grabbed her, put a knife to her throat, and threatened to use the knife if she moved. He took her into the bathroom, made her sit on the floor, and closed the door. The defendant told her to take off her clothes and tied her shirt over her eyes. He had her lie down on the floor. He spread her legs apart, lay down on top of her, and had sexual intercourse with her for 2 to 3 minutes. When he was done, he told her to count to 30 after he left.

After the prosecutrix heard the door close, she removed her blindfold and got dressed. The laundromat was empty, but just outside the door she spotted the woman who had been in there earlier. The victim told the woman she had been raped, and the woman, who later identified the defendant as the man in the laundromat, helped her contact the police and her husband. The emergency room doctor testified there was no trauma to the patient's vaginal area, but described the victim as being emotionally upset.

The robbery and use of a knife crimes, counts V and VI,

occurred an hour or so later that same day, August 7, 1987. At about 8:19 a.m., the victim left her home and went to take her car out of the garage. She placed her purse on top of the cardboard sunscreen which was sitting on the front passenger side floor. She started to put her keys in the ignition and shut her car door, but the door would not shut because a man was standing next to her with a knife.

The defendant told her to give him her purse. She was unable to speak or move, and the man told her again to give him her purse. She told him to take the purse, and the defendant, holding the knife in his right hand, reached over her with his left hand and took the purse. He pulled her out of the car and said he was going to tie her up. She told him not to tie her up because she had a job interview, and he did not. He took her keys and, as he left, he shut the garage door, leaving the keys on the ground. She ran into the house and called the police. The victim identified the defendant in court as the man who took her purse.

We proceed now to the defendant's arrest. At 10:30 a.m. on August 8, 1987, Officer Duckworth of the Lincoln Police Department contacted a woman regarding her complaint of an alleged indecent exposure incident which occurred between 9 and 9:30 that morning. She told Officer Duckworth that, as she was walking north on the east side of 13th Street, in the area of 13th and Peach Streets, she saw a man kneeling on the ground behind some bushes. She thought he was masturbating, but she could not see his penis and was unable to tell what he was doing. At some point, the man made a comment to her; he later stood up and waved to her. The police received another call stating a muscular black man was wandering around the same neighborhood. An investigation was commenced, with the help of other officers, in this area. Based on information gathered in the course of the canvass of the neighborhood, the officers were ultimately led to an apartment at 1320 Peach Street. The officers could hear noises coming from the apartment but could not get the occupant to open the door. The officers found some weightlifting trophies marked NSP (Nebraska State Penitentiary) on the front porch.

Officer Duckworth attempted to obtain search and arrest

warrants, while the other officers remained outside the apartment. He was unsuccessful in obtaining either warrant. After he returned to the apartment, the woman with whom the defendant was staying had come home. The police advised her they were looking for a man they believed to be in her apartment. She let the officers in and stated it was all right to search for him. Once inside the apartment, the officers found the defendant hiding in the attic and placed him under arrest for disturbing the peace. The defendant was taken to the Lincoln Police Department, after which police officers discovered that there was an active warrant for the defendant for failure to appear on a traffic citation.

After he was arrested, the defendant signed a consent to search form, agreed to provide hair and body fluid samples for a rape kit, was fingerprinted and photographed, and gave three *Miranda* statements. Consents were given by both the defendant and his girlfriend to search the premises. The search of the apartment revealed several items which linked the defendant to the sexual assaults. The defendant claims all of this evidence was the direct result of an illegal arrest.

THE ARREST

The defendant's first assignment of error claims the trial court should have suppressed statements and evidence obtained incident to arrest. He claims his arrest was invalid because the police did not have probable cause to arrest him, based on the failure to obtain an arrest warrant when they requested one. Therefore, any evidence gathered as a result of the arrest is "fruit of the poisonous tree" and should have been excluded from the trial.

It is necessary to begin by establishing what evidence would be suppressed if the arrest was not valid. Only evidence obtained as a direct result of the arrest would be suppressed. Although the defendant argues to the contrary, the evidence taken as a result of the apartment search would not be suppressed. The defendant's girlfriend admitted the police to the apartment after having been informed of the circumstances. She voluntarily consented to the search of the apartment. The evidence indicates her name was the only name

on the mailbox at the apartment. She told police the defendant lived in the apartment only periodically. She had an equal right to occupy the premises, and her consent to search is sufficient to validate the search of the apartment. See *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978). Therefore, if the arrest was invalid, the evidence which would be suppressed as a result would be any inculpatory statements the defendant made after the arrest, the body tissue and fluid samples, and results of the tests on the body tissue and fluid samples.

The State argues the outstanding warrant provided a sufficient basis to support defendant's arrest. It is clear that once the police had determined defendant's name, a check of police files would have revealed the outstanding warrant, which would have supplied a legal basis for the arrest. However, that is not what happened here. The police did not know of the outstanding warrant until after the defendant was already arrested. A warrantless arrest which occurs without probable cause cannot be made lawful by events which occur afterward. *Rios v. United States*, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960). Thus, the fact that there was a warrant outstanding for the defendant's arrest will not make the arrest lawful, as this was not the basis for the arrest of the defendant.

Two arguments are made concerning the invalidity of the arrest.

First, the defendant claims the arrest was invalid because he was not arrested pursuant to a known arrest warrant. Neb. Rev. Stat. § 29-404.02 (Reissue 1985) specifies an arrest without a warrant may be made when a peace officer has reasonable cause to believe that a person has committed "(2) a misdemeanor, and the officer has reasonable cause to believe that such person . . . (a) will not be apprehended unless immediately arrested. . . ."

The circumstances of the arrest provide a solid basis for finding the police had a reasonable belief that if the defendant was not immediately arrested, he would not be apprehended. He asked a neighbor to tell police the neighbor had not seen the defendant that particular day. He hid in the apartment and refused to open the door or to identify himself. When the police entered the apartment with the girlfriend, the defendant hid in

the attic of the apartment, despite the apparent heat in the attic. When the police attempted to investigate the noises coming from the attic, the defendant stood on the door leading to the attic, barring the police's entry.

The Supreme Court will uphold the trial court's findings of fact on a motion to suppress unless they are clearly erroneous. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Hoer*, 231 Neb. 336, 436 N.W.2d 179 (1989). In determining whether the findings are clearly erroneous, we do not reweigh the evidence or resolve conflicts in the evidence; rather, we recognize the trial court as the finder of fact and take into consideration that the trial court had the opportunity to observe the witnesses testifying in regard to the motion to suppress. *State v. Sardeson, supra*; *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988). In this case, the judge presiding at the hearing specifically found:

> [T]he activities up to that point [when Martin came down from the attic] would give every indication that should he not be taken into custody, that he may well flee . . . and the court does find that there was reasonable cause to believe that Mr. Martin had committed a misdemeanor offense and that there was reasonable cause to believe that he might flee and not be apprehended unless he was arrested.

The record contains ample evidence to support this finding. The finding was not clearly erroneous.

Second, the defendant claims the arrest for disturbing the peace was a pretext to obtain information concerning several sexual assaults which had taken place in Lincoln in the previous months. In *State v. Vann, supra*, the Nebraska Supreme Court cited two definitions of the phrase "pretext arrest": (1) an arrest made for the purpose of conducting a search incident to arrest when there was a legally insufficient reason to support the arrest, citing Burkhoff, *The Pretext Search Doctrine, Now You See It, Now You Don't*, 17 U. Mich. J.L. Ref. 523 (1984); and (2) an arrest which is only a front or a sham used as an excuse for making a search, citing *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961). The determination of whether an arrest is pretextual is a question of fact for the trial court. *State v. Vann,*

supra. This court will not reverse a trial court's finding on this question unless the finding is clearly erroneous. *Id.* Defendant's arrest does not fall within the definitions of a pretext arrest found in *Vann*. Clearly, there was a legally sufficient reason to support the arrest—a citizen complaint of disturbing the peace. Since there was a legally sufficient reason to arrest the defendant, the arrest cannot be said to be only a sham or a front to obtain information on the sexual assaults.

LESSER-INCLUDED OFFENSES

The second and third assignments of error claim the trial court erred in not giving instructions on lesser-included offenses. The defendant requested an instruction on attempted first degree sexual assault in connection with the third count in the information and an instruction on theft in connection with the robbery count. Both requests were denied by the trial judge.

"When defendant requests the trial court to submit a lesser-included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict." (Syllabus of the court.) *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966).

" 'When the evidence entirely fails to show an offense of a less degree than that charged in the information it is not prejudicial error to omit to give an instruction defining an offense of such less degree.' " *State v. Tamburano*, 201 Neb. 703, 706-07, 271 N.W.2d 472, 474 (1978), quoting *Fager v. State*, 49 Neb. 439, 68 N.W. 611 (1896); *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980).

On the robbery count, the defendant argues that because the purse was taken from the car floor next to the victim, an instruction on the lesser-included crime of theft should have been given because the jury might have found the purse was not taken from the victim but rather from the victim's car. The only evidence presented concerning the robbery showed the defendant placed a knife at the victim's throat and asked for her purse. The purse was sitting on the floor of the car next to the victim. The victim was frightened and unable to move; therefore, she told the defendant to get the purse himself. For an act to be deemed robbery, it is not necessary that property be

taken from the person; it is sufficient if the property is taken from the individual's personal presence, protection, or control. *State v. Welchel*, 207 Neb. 337, 299 N.W.2d 155 (1980). There is no claim that any evidence indicated the purse was not taken from the victim's presence. Thus, there was no evidence that any crime other than robbery was committed in this instance. Therefore, the trial court did not err in refusing to give an instruction on the lesser-included offense of theft.

Concerning the claim that an instruction on the lesser-included offense of attempted first degree sexual assault should have been given on count III, the evidence offered in support of the instruction on the lesser charge is not sufficient to support an instruction on attempted first degree sexual assault. The defendant relies on two pieces of evidence to support the lesser-included charge: (1) statements made by Martin to the police following his arrest, and (2) his interpretation of laboratory tests. The issue is not whether the defendant had sexual intercourse with the victim; rather, the issue is whether the defendant achieved even the slightest penetration. See § 28-319. There is no evidence contradicting the victim's testimony that the defendant achieved penetration. Officer Sorensen testified that, following the arrest, defendant stated he did not "think" he had sex with the third victim because he does not have sex with women who are having their menstrual periods. The forensic serologist testified that the laboratory analysis of the semen stains could not eliminate the suspect (the defendant) as a possible semen donor. This evidence clearly does not contradict the proof in regard to the element of penetration. Therefore, the trial court did not err in refusing to instruct the jury on the lesser-included offense of attempted first degree sexual assault.

Both requests for instructions on lesser-included offenses are based on the contention that the jury might not believe the testimony of the State's witnesses. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. *State v. Narcisse,* 231 Neb. 805, 438 N.W.2d 743 (1989); *State v. Tamburano, supra.*

The fourth assignment of error complains the trial court should not have given instruction No. 11, concerning the charge of robbery. At the instruction conference, defense counsel objected to the instruction because it stated that it is not essential in a robbery for money or personal property of some value be taken from the *person* of the victim. This assignment of error is not discussed in the defendant's brief. Errors assigned but not discussed are not considered by this court. *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989); *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989). Further, no plain error exists with this instruction because it is a correct statement of the law. The taking of property in a robbery need not be from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Welchel, supra.* Therefore, no error was committed in giving the instruction.

SERIOUS PERSONAL INJURY

As we have seen on counts I, II, and III of the information, the defendant was convicted of the offense of first degree sexual assault and received the maximum sentences. The defendant claims the district court erred in not specifically finding serious personal injury or, finding such injury, did so on insufficient grounds. The defendant cites the following statutes:

"Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor shall have caused *serious personal injury* to the victim in reaching his decision on the sentence." (Emphasis supplied.) § 28-319(2).

"Serious personal injury shall mean great bodily injury or disfigurement, *extreme mental anguish or mental trauma*, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." (Emphasis supplied.) Neb. Rev. Stat. § 28-318(4) (Reissue 1985). Based on these statutes, the defendant advances a theory that there must be a separate hearing to determine "serious personal injury" or that, at least in this case, there was insufficient evidence for such finding.

In support of the hearing concept, the defendant cites a Nebraska case and the Nebraska Constitution. See, *State v.*

Country, 194 Neb. 570, 234 N.W.2d 593 (1975); Neb. Const. art. I, § 23. In the *Country* case it was stated:

> The record before us discloses none of the details of the commission of the crime in question. It cannot be determined from the record before us whether or not serious personal injury, as that term is defined by L.B. 23, has occurred. This may in part, of course, be because of the nature of the plea entered.
>
> It seems to us that the provisions relating to the determination of punishment make it necessary that before a judge can, on a plea of guilty or nolo contendere, determine a sentence he must in some manner determine the fact and extent of the serious personal injury inflicted on the victim by the actor.

State v. Country, supra at 573, 234 N.W.2d at 595.

The defendant in the *Country* case entered a plea, and there was no trial or evidentiary hearing. The record was blank regarding the details of the crime. In this case, however, the court had received detailed descriptions from the victims of the assaults and descriptions by medical and law enforcement professionals, as well as by other witnesses, as to the emotional impact on the victims. Specific victim impact statements were also contained in the presentence report. Additionally, the court had observed the witnesses in their testimony, and any observations of emotional trauma could validly be used in determining the extent of serious personal injury to the victims. Therefore, an additional hearing to determine serious personal injury was not necessary.

This record is replete with observations by others of the mental trauma experienced by the victims immediately after the assaults. The presentence report contains letters from the victims as well as letters from members of the victims' families detailing the mental anguish and trauma suffered by the victims. The testimony of each victim was that she feared for her life and offered no resistance because of her fear.

The extreme mental anguish and trauma outlined in the facts described herein and at trial, by any criteria, could be found to equate to the "serious personal injury" requirement of the statute. Based on this analysis and the record, the defendant's

constitutional complaint of a lack of an adequate appeal record to scrutinize, on the issue of serious personal injury, is without merit.

A few more words in regard to the sentencing process. As we have pointed out, to state that sentencing is an important part of the criminal justice system is an expression of a truism. *State v. Barker*, 231 Neb. 430, 436 N.W.2d 520 (1989). As the U.S. Supreme Court observed in *Bradley v. United States*, 410 U.S. 605, 609, 93 S. Ct. 1151, 35 L. Ed. 2d 528 (1973), "The term 'prosecution' clearly imports a beginning and an end. . . . In the legal sense, a prosecution terminates only when sentence is imposed." In this regard, the Supreme Court has also stated:

> It is surely true . . . that a trial judge . . . generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.

United States v. Tucker, 404 U.S. 443, 446-47, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). See, *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969); *State v. Porter*, 209 Neb. 722, 310 N.W.2d 926 (1981).

This record reflects such an inquiry by the court, and its decision, in regard to the finding of serious personal injury on counts I, II, and III, comports with Nebraska law and the Nebraska and U.S. Constitutions.

SENTENCES

The defendant claims his sentences were excessive and disproportionate to the severity of the offenses. He reasserts the argument that the sexual assaults did not cause serious personal injury and, surprisingly, that the robbery did not cause substantial pecuniary loss. The first contention has been previously answered, but the defendant advances the view that the sexual assault victims herein were not brutalized, and therefore the sentences are excessive or disproportionate. Cruelty, as we have seen, can be mental as well as physical. To suggest that there was no brutality in the first degree sexual assaults in this record shows a failure to comprehend that first

degree sexual assault in and of itself is a brutal crime. The pecuniary loss question does not merit discussion.

In a case cited by the defendant, we stated:

> In determining whether probation should be granted, and, if a sentence is to be imposed, its severity, there are many factors to be considered. The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent to others and *to lock up incorrigible criminals.*

(Emphasis supplied.) *State v. Etchison*, 188 Neb. 134, 137, 195 N.W.2d 498, 501 (1972).

The defendant has a lengthy juvenile record beginning at the age of 13. A large amount of defendant's childhood was spent at the Youth Development Center at either Geneva or Kearney. Defendant's adult record indicates that he has been unable to spend more than a few months outside of prison walls without committing additional crimes. Defendant's criminal record includes prior felony convictions for rape, use of a knife to commit a felony, and theft. The court also had before it at sentencing two medical reports evaluating the defendant and finding him to be a nontreatable mentally disordered sex offender. These reports also include comments made by the defendant, whether exaggerated or not, admitting to numerous sexual assaults for which he was not charged.

In passing sentence, the court noted the emotional trauma, embarrassment, anguish, and fear experienced by the victims. The court also cited the defendant's long history of serious problems with the law. In pronouncing sentence, the court specifically stated:

> This defendant is a very dangerous individual. He presents a very serious risk to society and he must simply be separated from society in order to protect society. Defendant deserves and will receive the maximum sentence allowed by the law on all counts.
>
> Having regard for the nature and circumstances of these crimes and the history, character, and condition of this defendant, the Court finds that imprisonment of this defendant is necessary for the protection of the public

because lesser sentences than are to be imposed would depreciate the seriousness of these crimes and promote disrespect for the law.

The sentences given to the defendant are within the limits set out by the statutes for the offenses of which he was found guilty. The court adequately set out the reasons for the sentences given to the defendant. Additionally, the defendant has not shown any abuse of discretion on the part of the court in imposing sentence. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Barker*, 231 Neb. 430, 436 N.W.2d 520 (1989); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

This court finding no error, the decision and sentences of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRIE L. MASON, APPELLANT.
440 N.W.2d 490

Filed June 2, 1989. No. 88-308.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
2. **Theft: Conspiracy: Liability.** The participant in a conspiratorial effort to steal is liable for the value of all items taken.
3. **Sentences: Appeal and Error.** A sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Alan G. Stoler for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

Following a trial in the county court for Douglas County, Nebraska, the defendant, Terrie L. Mason, was found guilty of shoplifting over $100. The county judge sentenced the defendant to 6 months' imprisonment in the county jail and a $500 fine. The defendant appeals the conviction and sentence imposed by the county court, which were appealed to the district court for Douglas County. The district court affirmed the judgment.

The record reflects that in the evening hours of December 23, 1987, an employee responsible for store security of the ShopKo store at 7402 North 30th Street in Omaha, Nebraska, observed the defendant and another woman leaving the checkout area pushing a shopping cart containing two large ShopKo bags. Instead of exiting the store, they returned into the store. The employee followed them around the store, watching them add merchandise to the cart and bags. Thereafter, the defendant and her accomplice attempted to leave the store without paying for the added merchandise. At this point, the security employee detained the defendant and her accomplice, and an arrest was made. The defendant denied reentering the store, testifying that she had split the cost of items with her friend, and denied attempting to remove items from the store by concealing them.

The defendant's assignments of error are that the evidence was not sufficient to support a finding of guilt of shoplifting of over $100 and that the sentence of 6 months' imprisonment and a fine of $500 was an abuse of discretion. We affirm.

With regard to the defendant's first assignment of error, we have held numerous times that in determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988).

The defendant argues that the items allegedly shoplifted specifically by her do not total in excess of $100, although from the evidence it appears that the total of the items taken was well in excess of $100. Neb. Rev. Stat. § 28-206 (Reissue 1985) states as follows: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." In *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981), this court interpreted this section in the context of a brawl which resulted in an assault conviction, although the court noted that in the context of the brawl, attributing particular injuries to particular actions was difficult. This court, however, observed that as a participant in the conspiratorial effort to harm the victim, the defendant was liable for all the victim's injuries. Therefore, the appellant was deemed punishable for all injuries resulting from the crime as a principal, without the necessity of proving his own particular causation for a particular injury. In applying the principles of the *Thomas* case to the case at bar, the parallels are many.

Both the defendant and her accomplice were present at the place of the crime, the store, participating in taking the merchandise. As a participant in a conspiratorial effort to steal from the ShopKo store, the defendant is liable for all items taken.

With respect to the defendant's claim that the sentence of 6 months in the county jail and a $500 fine is excessive for a Class I misdemeanor, which carries a maximum jail term of 1 year, a $1,000 fine, or both, this court has repeatedly held that a sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge. *State v. Lewis*, 230 Neb. 224, 430 N.W.2d 686 (1988); *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988).

In this case the sentence was well within the limits of the statute and, considering the fact that the record tells us little more than the fact that the defendant had been in jail shortly before the time of sentencing, we can find no abuse of discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS H. JENSON, APPELLANT.

440 N.W.2d 686

Filed June 2, 1989. No. 88-473.

1. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal, irrespective of whether the litigant shows prejudice.
2. **Trial: Judges: Appeal and Error.** One cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome.
3. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a prison sentence within the statutory limits will not be overturned on appeal absent an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Anthony S. Troia for appellant.

Robert M. Spire, Attorney General, and Denise Frost for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., and COADY, D.J.

PER CURIAM.

Defendant, Douglas H. Jenson, having pled no contest to third offense drunk driving, appeals, asserting the district court erred in failing to find that the county court committed error in (1) engaging in presentence ex parte conversation with the prosecution and (2) imposing an excessive sentence. We affirm.

Jenson successfully challenged in the district court his initial sentence of incarceration for a period of 90 days, suspension of his driver's license for 15 years, and a fine of $500 when the district court found that the county judge imposing that sentence had improperly relied on information in the presentence report which came from anonymous callers. The district court affirmed the finding of guilt but remanded the matter to the county court for resentencing by another county court judge. No appeal was taken from that district court decision, and we thus do not concern ourselves with it any

further.

The second county court judge, following a hearing, imposed a sentence identical to that imposed initially. This appeal is from that sentence.

On the occasion of the second sentencing, Jenson, through his attorney, conveyed his impression that the judge had held ex parte communications concerning the matter with the prosecution. The judge denied such, replying:

> The prosecution has not talked with me about this matter at all. There was a conversation in the antechambers of the trial court, in which I was quite frankly puzzled. And I subsequently went to [the district judge remanding the matter] and asked him to clarify it for me. . . . I have not discussed this matter with [the county judge imposing the initial sentence], other than to say in passing, "I understand I'm going to handle some case that you had." And that has been the total substance of the discussion.
>
> I have not discussed this matter with a member from the prosecutor's office. I had a puzzlement as to how I was supposed to — my original — without seeing [the district judge's] order — thought was that I was to handle this without some review at all of the probation office file. And not of course having heard the case, I was amazed at how I was supposed to do this.
>
> And insofar as any conversations with the prosecutor's office or any other judges regarding the contents of this matter, I haven't had any.

The judge then went on to say that he had been given a presentence report, from which had been excised the material the district court had found to be improperly considered.

It appears that Jenson was satisfied with the second sentencing judge's explanation of what occurred and had no objection thereto, because Jenson at no time asked that judge to recuse himself. Nonetheless, he now, on the strength of *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), argues that the judge should have recused himself because of improper ex parte communications not with the district judge remanding the matter, but with the prosecution.

In *Barker*, the defendant was convicted of manslaughter.

Shortly after the verdict was announced, the prosecutor informed the trial judge that certain members of the victim's family wished to visit with him. Notwithstanding the objections of defendant's counsel and counsel's refusal to participate in the discussions, the judge visited with the family in the absence of the prosecutor and defense counsel and without recording what was said. That same judge later imposed sentence notwithstanding defendant's request that the judge recuse himself in view of the meeting he had had with the victim's family. In setting aside the sentence and remanding the matter for resentencing by another judge, we ruled that a judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal, irrespective of whether the litigant shows prejudice.

It is obvious that the *Barker* rule does not apply to the facts presently before us. Firstly, the record fails to show there was any ex parte communication between the second judge and the prosecution, as Jenson claims. Secondly, even if the record had shown such, Jenson made no request that the second judge recuse himself. One cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome. See, *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989); *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984).

Nor does the record support the second assignment of error, in connection with which Jenson argues he should have been placed on probation. The presentence report reveals that he had been placed on probation for drunk driving on three earlier occasions. The fact he is before the courts on such a charge again more than amply establishes that probation is not an appropriate sentence for him. The applicable rule is that an order denying probation and imposing a prison sentence within the statutory limits will not be overturned on appeal absent an abuse of discretion. *State v. Byrd,* 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Hinn,* 229 Neb. 556, 427 N.W.2d 791 (1988). See, also, *State v. Jones,* 230 Neb. 528, 432 N.W.2d 523 (1988).

Third offense drunk driving is a Class W misdemeanor, conviction of which, under the circumstances, made Jenson subject to an order not to drive for a period of 15 years, Neb. Rev. Stat. § 39-669.07 (Supp. 1987), to imprisonment for a period of not less than 3 months nor more than 6 months, and to a fine of $500. The sentence is within the statutory limits, and the record shows no abuse of discretion.

AFFIRMED.

CAPORALE, J., concurring.

Although I agree with the resolution reached by the majority, I write separately because its opinion fails to explain the basis for its correct statement that "the record fails to show there was any ex parte communication between the second judge and the prosecution."

According to *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), the provisions of Neb. Rev. Stat. § 27-605 (Reissue 1985) prohibit a judge presiding at a trial from testifying in that trial on any matter whatsoever, and the fact that such a judge was not sworn as a witness does not remove his or her incompetency to testify. *Barker* further establishes that it was not necessary for the State to have objected to the judge's statements to preserve the point of his incompetency. Thus, the comments of the judge in question must be treated as if he had remained silent. It is because of that legal reality and the fact that there is no other evidence of an ex parte conversation between the judge and the prosecution that the record fails to support defendant Douglas H. Jenson's claim.

If the majority's silence in regard to a judge's incompetency to testify at a trial over which he or she is presiding signals some doubt about what this court said in that regard just a bit more than a year ago in *Barker*, we ought to deal with the issue and not be content with writing a mystery.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER S. RITSCH, APPELLANT.

440 N.W.2d 689

Filed June 2, 1989. No. 88-504.

1. **Sentences: Appeal and Error.** A sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.
2. **Criminal Law: Courts: Sentences.** The courts of Nebraska are charged with the responsibility of imprisoning an offender for the protection of the public welfare if they believe that a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.
3. **Criminal Law: Sentences: Evidence.** The trial judge has discretion regarding the source and types of evidence which may be used in determining the kind and extent of punishment to be imposed within the limits fixed by statute.
4. **Hearsay: Presentence Reports.** Reliance upon hearsay information in a presentence investigation is not inappropriate.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Vanessa R. Jones for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

Following the filing of a second amended information in the district court for Douglas County, the defendant, Christopher S. Ritsch, pled guilty to two counts of sexual contact with persons 14 years of age or younger. Following a presentence investigation, the trial judge sentenced the defendant to a term of imprisonment of not less than 18 months nor more than 5 years on each count, with the sentences to be served concurrently. The defendant appeals and alleges two assignments of error.

The first assignment of error is that the trial court erred in imposing a jail sentence because probation was appropriate under the circumstances. The second assignment of error is that

the trial court erred in considering two letters contained in the presentence investigation report from the victims' parents and psychotherapist alleging that the defendant intentionally came in contact with the victims after criminal charges had been filed. We affirm.

With respect to the assignment of error of the defendant that the sentences of 18 months' to 5 years' imprisonment are excessive, this court has held that a sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge. *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988); *State v. Henn*, 223 Neb. 280, 388 N.W.2d 846 (1986); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). The courts of Nebraska are charged with the responsibility of imprisoning an offender for the protection of the public welfare if they believe that "[a] lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law." Neb. Rev. Stat. § 29-2260(2)(c) (Cum. Supp. 1986). In this case, the district court found these to be very serious crimes, which had lasting effects upon the victims, and therefore imposed the sentences of imprisonment. Also, defendant was convicted of two Class IV felonies which are punishable by not more than 5 years' imprisonment, up to a $10,000 fine, or both. Neb. Rev. Stat. §§ 28-320.01 and 28-105 (Reissue 1985). Clearly, defendant's sentence of 18 months to 5 years falls within the prescribed statutory limits, and the two counts are to run concurrently. We find no basis upon which to find that the trial court abused its discretion.

The defendant's final assignment is a complaint of the inclusion in the presentence investigation report of letters from the victims' parents and psychologist, which the defendant objected to strongly at the time of sentencing. We stated in *State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648 (1969):

> It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the sourse [sic] and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his

> determination of an appropriate sentence is the gaining of knowledge concerning the defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue.

Furthermore, in *State v. Porter*, 209 Neb. 722, 723, 310 N.W.2d 926, 927 (1981), this court stated: "By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information." In the case at hand, the defendant had an opportunity to review the presentence report and, at the sentencing hearing, did object strenuously to the inclusion of these items therein. At the same time, the defendant did have included in the presentence report numerous letters from friends, family, and business acquaintances. The defendant had an opportunity at the time of sentencing to rebut the statements made in the letters and to the items included in the presentence report to which he objected, but he did not do so. There is no showing in the record that the sentencing judge did consider these items when sentencing the defendant, although we do not believe it is error if he did so. Considering the fact that the defendant had sufficient opportunity to rebut the statements made in the presentence report, we believe there is no merit to this assignment of error.

AFFIRMED.

NANCY J. RANGE, APPELLANT, V. J. MARTIN RANGE, APPELLEE.

440 N.W.2d 691

Filed June 2, 1989. No. 88-882.

1. **Jurisdiction: Parties.** A motion invoking the power of the court on any question other than jurisdiction over the person constitutes a general appearance and confers jurisdiction over the moving party.
2. **Jurisdiction: Child Custody: States.** Questions of jurisdiction under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1988), are primarily questions as to which state should exercise its jurisdiction rather than which state has jurisdiction.
3. _____: _____: _____. Under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1988), the state which originally determined custody should exercise its continuing jurisdiction to determine whether a change in custody should be made unless there are good reasons for a different state to exercise its jurisdiction.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Richard F. Welling and Alan M. Thelen, of Breeling & Welling, for appellant.

Chris M. Arps, of Arps & Schirber Law Offices, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

BOSLAUGH, J.

The petitioner, Nancy J. Range, now Nancy Loftus, has appealed from the order of the district court modifying its decree of May 10, 1985, as previously modified on June 18, 1986, so as to award custody of Nicole D. Range to the respondent, J. Martin Range, and fixing the child support for the children still in the custody of the petitioner at $146 per month.

The marriage of the parties was dissolved by the decree of May 10, 1985. Custody of the minor children of the parties, Kristi M. Range, born September 7, 1972; Nicole D. Range, born April 30, 1974; Jaymi L. Range, born March 24, 1977; and Karri N. Range, born January 23, 1980, was awarded to the parties jointly, with possession awarded to the petitioner.

On June 18, 1986, the decree was modified by awarding sole custody of Kristi to the respondent and sole custody of the other children to the petitioner. The petitioner was granted leave to remove the three children in her custody from Nebraska, and child support and visitation rights were determined.

On October 23, 1987, the respondent filed an application to further modify the decree so as to transfer custody of Nicole from the petitioner to the respondent. On November 9, 1987, the trial court awarded temporary custody of Nicole to the respondent by an ex parte order and appointed a guardian ad litem for Nicole.

On November 13, 1987, the petitioner filed a "Special Appearance," alleging that the district court did not have personal jurisdiction over the petitioner or jurisdiction over the subject matter. The petitioner prayed that, among other things, the application be dismissed.

An amended application was filed on November 20, 1987, and a second "Special Appearance" was filed on December 30, 1987. The special appearance was overruled on January 8, 1988.

A second amended application, which was positively verified, was filed on January 26, 1988. A third "Special Appearance" was filed on March 3, 1988, and a "Responsive Pleading" on March 22, 1988.

On September 6, 1988, the trial court found that there had been a substantial change of circumstances and that it was in the best interests of Nicole D. Range that her custody be changed from the petitioner to the respondent. It is from this order that the petitioner has appealed.

The petitioner's assignment of error is that the trial court "erred in finding that it had jurisdiction over the subject matter and persons at issue in the Appellee's Amended Application to Modify."

So far as jurisdiction over the person of the petitioner is concerned, each of the special appearances filed by the petitioner requested affirmative relief and constituted a general appearance. A motion invoking the power of the court on any question other than jurisdiction over the person constitutes a general appearance and confers jurisdiction over the moving

party. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980).

The petitioner's contentions in regard to jurisdiction over the subject matter are based on the provisions of the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1988). The petitioner argues that since Georgia is now the home state of Nicole, and her only "significant connections" are with the State of Georgia, the district court for Sarpy County had no jurisdiction to modify the decree on September 6, 1988. The petitioner relies on *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983), as supporting her contentions.

There are substantial differences between this case and the *Mace* case. The children involved in *Mace* were much younger and had moved to Nebraska with their mother immediately following the award of custody to her. All of the evidence concerning their lives and care while in the custody of their mother was in Nebraska, which had become their home state.

Section 43-1203 is the section relating to initial or modification jurisdiction. Subsection (a) relates to jurisdiction based upon this state being the "home state" of the child. Subsection (b) provides:

> It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

Section 43-1214(1) provides:

> If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

A number of courts have held that this provision of the uniform act establishes a strong preference for the state which

originally determined custody to exercise its continuing jurisdiction if the requirements of § 43-1203(b) are satisfied.

In *Kumar v. Superior Court of Santa Clara Cty.*, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982), the Supreme Court of California held that New York, which had rendered the initial custody decree, had continuing jurisdiction to modify its custody decree and California had no authority to modify the decree. In that case the court said at 32 Cal. 3d at 695-96, 652 P.2d at 1006-07, 186 Cal. Rptr. at 775-76:

> The jurisdictional grounds for making a child custody determination are set out in section 5152 of the Uniform Act. Sections that follow address due process rights of the parties and prescribe appropriate procedures. Other sections, crucial to our determination, articulate the circumstances or situations in which the courts may or should decline to *exercise* jurisdiction. The sections relied upon by Jitendra (§§ 5155, 5157, and 5163) fall in the latter category. We stress this point because both parties speak of either California or New York as lacking "jurisdiction" to act in the instant matter, when the crucial question is really whether the Uniform Act directs or allows exercise of jurisdiction. As shall appear, it is obvious that each state can claim to have jurisdiction from among the multifaceted components of section 5152. Indeed, this case is a good example of the "jurisdictional competition and conflict" (§ 5150) which the Uniform Act was designed to alleviate.
>
> While the courts have given lip service to the policies provided by the Uniform Act, some have been reluctant to forego what they see as concurrent jurisdiction to proceed under the act. In no area has the confusion been greater than in the modification of out-of-state custody decrees.
>
> Consistent with its goal of avoiding "relitigation of custody decisions of other states in this state insofar as feasible" (§ 1, subd. (6); Civ.Code, § 5150, subd. (f)), the Uniform Act commands in section 13 (Civ.Code, § 5162) that the courts of this state shall recognize and enforce "an initial or modification decree" of a court of another state which had assumed jurisdiction under the terms of the act.

The next section, section 14 of the Uniform Act (Civ.Code, § 5163), governs the authority of California to modify an out-of-state decree. Section 5163 provides: "(1) If a court of another state has made a custody decree, a court of this state *shall not modify that decree* unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction." (Emphasis added.)

Professor Bodenheimer, reporter for the special committee which drafted the Uniform Act, interpreted the section's language—"this state shall not modify"—as meaning precisely what it says: "In other words, the continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction. Section 14 is the key provision which carries out the Act's two objectives of (1) preventing the harm done to children by shifting them from state to state to relitigate custody, and (2) preventing jurisdictional conflict between the states after a custody decree has been rendered. . . . [¶] Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. *Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.*" (Emphasis added; Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA* (1981) 14 Fam.L.Q. 203, 214-215.)

The court further stated at 32 Cal. 3d at 698-700, 652 P.2d at 1009-10, 186 Cal. Rptr. at 778-79:

Thus, in accord with the letter of section 5163 and its purpose "to achieve greater stability of custody

arrangements and avoid forum shopping" (9 U.Laws Annot. (1979 ed.) p. 154, Commrs. Note), *all* petitions for modification must be addressed to the state which rendered the original decree if that state had and retains jurisdiction under the standards of the act. (*Id.*; *Palm v. Superior Court* (1979) 97 Cal.App.3d 456, 468, 158 Cal.Rptr. 786; *In re Marriage of Schwander* (1978) 79 Cal.App.3d 1013, 1019, 145 Cal.Rptr. 325.)

In support of her claim that California has jurisdiction to modify the New York decree, Yvonne relies upon what has been termed the "myth of concurrent modification jurisdiction." (Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, supra*, 14 Fam.L.Q. 203, 216.) Under Yvonne's analysis, one starts with section 5152, rather than section 5163: California has jurisdiction as Sunjay's "home state" (§ 5152, subd. (1)(a)); New York has some connection with Sunjay (§ 5152, subd. (1)(b)). Yvonne then considers which forum has greater connection with the child and concludes, as did the trial court, that California has the "closest" connections.

Yvonne is not alone in the confusion engendered by the failure to recognize the applicability of section 5163 whenever a *modification* of jurisdiction is involved. California appellate courts have played some part in perpetuating the myth of concurrent modification jurisdiction. The confusion can be avoided by clearly distinguishing between initial and modification jurisdiction.

Initial jurisdiction is determined by the guidelines of section 5152, which point to the state with the closest connections to the child and to information about his present and future well-being. *Modification* jurisdiction is perhaps best viewed as an extension of the recognition and enforcement provisions of the Uniform Act. (§ 5162; Bodenheimer, 65 Cal.L.Rev. 978, 983-984.) California is not effectively enforcing the New York decree if it modifies the decree as soon as the child has spent six months within its borders. Under section 5163, the strong

> presumption is that the decree state will continue to have modification jurisdiction until it loses all or almost all connection with the child. If that state has lost contact, the analysis begins again with section 5152 to determine which other state has closest contact.
>
> Application of the provisions of section 5163 to the instant case compels the conclusion that New York has continuing jurisdiction to modify its decree so long as Jitendra resides there and continues to assert and exercise his custody/visitation rights.

See, also, *In re Marriage of Leyda*, 398 N.W.2d 815 (Iowa 1987); *In re Marriage of McEvoy*, 414 N.W.2d 855 (Iowa App. 1987); *Kraft v. District Ct.*, 197 Colo. 10, 593 P.2d 321 (1979); *Clark v. Kendrick*, 670 P.2d 32 (Colo. App. 1983); *Clarke v. Clarke*, 126 N.H. 753, 496 A.2d 361 (1985); *Pitts v. Sutter*, 408 So. 2d 105 (Ala. Civ. App. 1981); *Bloodgood v. Whigham*, 408 So. 2d 122 (Ala. Civ. App. 1981); *Jefferson v. Downs*, 107 Misc. 2d 852, 436 N.Y.S.2d 169 (1981); *Neger v. Neger*, 93 N.J. 15, 459 A.2d 628 (1983).

Contrary to the contentions of the petitioner, the record in this case shows that Nicole has substantial and significant connections with Nebraska. Nicole was born in Nebraska and has lived most of her life in Nebraska. She has grandparents and uncles and aunts in Nebraska, but has no relatives in Georgia other than her mother and sisters.

At the time of the hearing, Nicole was over 14 years of age. The record shows that she is extremely bright and performs well scholastically. She has a pleasant personality and makes friends easily. At the hearing, she expressed a strong preference to live with her father and older sister in Nebraska. She is not a child who is very young and unable to make a reasoned decision.

Another substantial contact which both the respondent and Nicole have with Nebraska is the fact that the Sarpy County District Court and Judge Thompson have been involved in this case since the original divorce petition was filed in May 1985. Judge Thompson heard the modification application which resulted in the June 1986 order modifying the decree, and granted custody of the oldest daughter to the father. This is the third time the parties have been before this district court and

this district court judge.

The respondent is employed by Fruehauf Corporation and has rejected several promotions so that he would not have to move from Nebraska. He has consistently exercised his visitation rights.

The petitioner has remarried, and Nicole has had difficulty with the petitioner's new husband. Some friction has developed between Nicole and her mother and the two younger sisters.

The respondent testified that in the summer of 1987, Nicole was in Nebraska for 38 days for her visitation with him. At that time she wanted to stay in Nebraska, but he insisted that she return to Georgia and discuss the matter with the petitioner. Nicole did so and told the respondent that the petitioner had said she could stay in Nebraska. The respondent then sent a plane ticket to Georgia, and Nicole returned to Nebraska on August 15, 1987. The respondent enrolled Nicole in school and made arrangements for her medical, dental, and orthodontal care. According to Nicole, the petitioner had told her that "whatever I wanted to do was fine with her and it was my decision . . . ."

The petitioner testified that she allowed Nicole to return to Nebraska for only a temporary period. Apparently, as a result of the misunderstanding, the petitioner returned to Nebraska on November 9, 1987, and armed with a copy of the order of modification of June 18, 1986, and accompanied by a policeman, took Nicole out of school, gathered up Nicole's belongings at the respondent's home, and returned to Georgia with Nicole.

The guardian ad litem urged the trial court to respect the request of Nicole to be allowed to return to Nebraska and live with her father and older sister.

The record supports the finding that it is in the best interests of Nicole that her custody be transferred from the petitioner to the respondent, that the district court for Sarpy County, Nebraska, had jurisdiction of the subject matter of the application and of the person of the petitioner, and that the award of custody to the respondent was not an abuse of discretion. For those reasons, the judgment of the district court is affirmed.

AFFIRMED.

MILBANK INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLEE, V. LILA L. HENRY ET AL., APPELLANTS.
441 N.W.2d 143

Filed June 9, 1989. No. 86-489.

1. **Insurance: Subrogation.** A subrogation clause in an automobile liability insurance policy which provides that in the event the insurer makes a payment to the insured under the medical payments coverage of the policy, the insurer shall be subrogated to any cause of action which the insured may have to recover damages from another person, is valid and binding on the insured.
2. **Insurance: Subrogation: Tort-feasors: Notice.** When a tort-feasor or the tort-feasor's liability insurer, with notice of an insurer's subrogation claim, procures a general release by making a settlement with the insured, the release will not affect the insurer's right of subrogation.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Raymond J. Walowski and J. Patrick Green for appellant Henry.

Daniel P. Chesire and Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellants Ammoura and Farmers Insurance Exchange.

Alan M. Thelen, of Breeling, Welling & Place, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The plaintiff, Milbank Insurance Company, commenced this action in the county court to recover $1,000 which it had paid to the defendant Lila L. Henry under the medical payments coverage of an automobile liability insurance policy which the plaintiff had issued. Henry had been injured in an automobile accident in which an automobile operated by the defendant Housam M. Ammoura had collided with the automobile insured by the plaintiff and operated by Henry. The defendant Farmers Insurance Exchange was the liability insurance carrier for Ammoura.

After the plaintiff had paid Henry, the plaintiff wrote to Farmers to notify it that the plaintiff was subrogated to Henry's

cause of action against Ammoura. Farmers wrote back to the plaintiff stating that it did not honor subrogation claims for medical payments coverage in Nebraska. Later, Farmers entered into a settlement with Henry in the amount of $12,000 and took a general release from Henry of all claims arising out of the accident. The plaintiff then commenced this action against Henry, Ammoura, and Farmers to recover the $1,000 that it had paid to Henry.

The county court found in favor of the plaintiff and against all defendants. Upon appeal to the district court, the judgment was affirmed. The defendants have now appealed to this court.

The case was tried upon a stipulation of facts, and the issues are purely questions of law.

The policy which the plaintiff had issued and which insured the automobile that Henry was operating at the time of the accident contained the following provision:

> 5. OUR RIGHT TO RECOVER PAYMENT
>
> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do whatever is necessary to enable us to exercise our rights and shall do nothing after loss to prejudice them.
>
> B. If we make a payment under this policy and the person, to or for whom payment is made recovers damages from another, that person shall hold in trust for us the proceeds of the recovery and shall reimburse us to the extent of our payment.

Henry contends that the subrogation clause in the policy issued by the plaintiff is not valid, at least as to payments made under medical payments coverage, for several reasons. Henry argues that it conflicts with the collateral source rule and the common-law rule against the assignment of personal injury claims. Henry concedes that there is a division of authority on the question and that it is probable that the majority of cases hold such clauses to be valid.

We think the better reasoned cases support the rule that such a subrogation clause is valid. Representative of such cases is *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 97, 99-101, 245

N.W.2d 844, 845-46 (1976), in which the court held:

> The insurance policy issued by Travelers provided that Travelers would be subrogated to the rights of any person to the extent of any medical payments made to that person. In National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N. W. 2d 152 (1967), we upheld the validity of this type of subrogation clause as between the insurer and its insured, but specifically reserved ruling on the validity of the subrogation clause as against a third-party tortfeasor. We stated (278 Minn. 49, 153 N. W. 2d 155):
>
> "If the present action were one in which plaintiff was attempting to assert a claim for the medical expenses paid by it against the tortfeasor who caused the injuries, the rules forbidding the assignment of claims for personal injuries might be applicable. But this is not such a situation and we need not anticipate it." We now hold that a subrogation clause of this kind which gives an insurer a right to subrogation against a third-party tortfeasor for medical payments actually made is a valid and enforceable contractual provision. It is well established as a principle of equity that upon payment of a loss an insurer is entitled to pursue those rights which the insured may have against a third party whose negligence or wrongful act caused the loss. Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co., 291 Minn. 97, 189 N. W. 2d 404 (1971). Applying this principle, the majority of jurisdictions have upheld the validity of insurance provisions which confer on an insurer a right of subrogation against third-party tortfeasors for medical payments actually made to its insured.
>
> We are not persuaded by Dairyland's argument that this type of subrogation clause constitutes an assignment of a cause of action for personal injuries. An insurer's subrogation to its insured's right of recovery against a tortfeasor is distinct from an assignment of a personal action. Subrogation involves the substitution of an insurer by operation of law to the rights of the insured because of the insurer's pre-existing duty to pay the insured for the

> loss. In contrast, an assignment involves a transfer of a legal claim from an injured party to a volunteer who was under no pre-existing duty to compensate the injured party. Moreover, under subrogation an insurer's recovery is limited to the amount paid to the insured, whereas there is no such limitation on an assignee's recovery. Thus, subrogation simply does not create the same risk of maintenance or champerty as does assignment. See, DeCespedes v. Prudence Mutual Cas. Co., 193 So. 2d 224 (Fla. App. 1966).

In *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Anderson*, 48 Ala. App. 172, 175, 263 So.2d 149, 152 (1972), the court noted that Illinois, Minnesota, New York, and Washington have held that "[m]edical payments subrogation merely impresses an equitable lien in favor of the insurer upon the proceeds of any recovery obtained by the insured from the tort-feasor to the extent of its payment." Michigan, Rhode Island, and Wisconsin have held that the right to medical pay subrogation is "based on contract; is not unfair or overreaching; and is accompanied by an appropriately reduced premium." Arkansas, the District of Columbia, Florida, New Jersey, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, and West Virginia hold that a subrogation provision such as the one involved in this case "merely provides for conventional subrogation and does not constitute an assignment."

We conclude that the policy provision was valid and binding on Henry.

The defendants Ammoura and Farmers make much the same arguments. Further, they argue that since the release bars any action by Henry, the plaintiff cannot recover against them. The defendants overlook the fact that the settlement with Henry was made with notice of the plaintiff's subrogation claim.

When the plaintiff paid the medical payments claim to Henry, the plaintiff acquired an interest in Henry's claim against Ammoura under the subrogation clause in its policy. Since Farmers had notice of the plaintiff's subrogation claim, it could not destroy the plaintiff's interest by a settlement with

Henry alone. As we said in *Beeder v. Fleer*, 211 Neb. 294, 299, 318 N.W.2d 708, 711 (1982), a suit involving subrogation resulting from payment of a claim under collision coverage,

> After receiving notice from USAA that the appellee's claim for property damage to her automobile had been assigned or subrogated to it, Allstate was under a legal obligation to make payment to USAA and not to the appellee even though the action was pending in the name of the appellee, for the reason that USAA was then the real owner of the property damage claim for damages to appellee's automobile by reason of its subrogated interest.

In *Omaha & R. V. R. Co. v. Granite State Fire Ins. Co.*, 53 Neb. 514, 73 N.W. 950 (1898), the insurance company paid $1,000 on a fire loss and took a partial assignment of the owner's cause of action against the railroad. The property owner, Erickson, then sued the railroad for the balance of his loss. After the railroad had settled that suit, the insurance company sued for the amount of the loss it had paid to the property owner, and recovered. In affirming the judgment the court said:

> The railroad's answer in the Erickson suit was therefore good, and stated a valid defense; its abandonment of the defense and stipulation for judgment against it amounted then to a waiver of a good defense and a voluntary payment. Knowing, as it then knew, of the rights of the insurance company, it is not protected, by that voluntary payment of Erickson's claim, against a valid claim of the insurance company not included in that settlement. Its action was equivalent to express consent to a splitting of the cause of action, and it can claim no estoppel against the insurance company because it acted with full knowledge of its rights and of its intention to assert them.

Id. at 519-20, 73 N.W. at 951.

In *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 97, 102-03, 245 N.W.2d 844, 847-48 (1976), the Minnesota Supreme Court held:

> In the instant case, Travelers informed both Vaccari and Dairyland of its subrogation interest. Despite notice of this interest, Vaccari and Dairyland settled with Travelers' insured, Mrs. Whaling, without heed to Travelers' claim,

and obtained a general release from her. Since, as a general rule, a subrogee is entitled to no greater rights than those which the subroger possesses, the question which then arises is whether the general release executed by Mrs. Whaling extinguished Travelers' subrogation claim.

While this court has previously indicated that "an insured may defeat the insurance company's rights of subrogation by * * * settling with the wrongdoer," we have never directly considered the issue of whether a settlement extinguishes an insurer's subrogation rights when that settlement is procured by a tortfeasor or his liability insurer *after* notice of the insurer's subrogation claim. The general rule in most jurisdictions is that when a tortfeasor or the tortfeasor's liability insurer, with notice of an insurer's subrogation claim, procures a general release by making a settlement with the insured, the release will not affect the insurer's right of subrogation. Vigilant Ins. Co. v. Bowman, 128 Ga. App. 872, 198 S. E. 2d 346 (1973); Transamerica Ins. Co. v. Barnes, 29 Utah 2d 101, 505 P. 2d 783 (1972); Hospital Serv. Corp. of Rhode Island v. Pennsylvania Ins. Co., 101 R. I. 708, 227 A. 2d 105 (1967). See, generally, Annotation, 92 A. L. R. 2d 102. Such a settlement is deemed to be the equivalent of a fraud upon the insurer and thus can have no effect upon the insurer's subrogation rights.

To hold that such a settlement destroys an insurer's subrogation rights would have the practical effect of encouraging a tortfeasor or his liability insurer to disregard notice of an insurer's valid subrogation claim and attempt to procure a general release from the insured. We believe that the tortfeasor and his liability insurer have a duty to act in good faith under such circumstances. Therefore, we hold that where a tortfeasor and his liability insurer willfully disregard notice of the subrogation claim of the injured person's insurer and enter into a separate settlement with the injured person, such a settlement does not defeat his insurer's subrogation rights.

In *Mutual Service v. American Family*, 140 Wis. 2d 555, 561, 410 N.W.2d 582, 584 (1987), an action to recover $2,000 paid

under medical payments coverage, the court said:

> It is clear from our past cases that an insurer who pays a claim on behalf of its insured, under a policy providing for subrogation, has a cause of action against the tortfeasor and the tortfeasor's insurer for its subrogated interest. *See Associated Hospital Service v. Milwaukee Automobile Mutual Insurance Co.*, 33 Wis. 2d 170, 147 N.W.2d 225 (1967). In such a situation, we have characterized the interests of the insurer and the insured as each owning separately a part of the claim against the tortfeasor. *Heifetz v. Johnson*, 61 Wis. 2d 111, 120, 211 N.W.2d 834 (1973); *Wilmot v. Racine County*, 136 Wis. 2d 57, 63-64, 400 N.W.2d 917 (1987).
>
> Because an insured and insurer each own separately part of the claim against the tortfeasor, a settlement or recovery by the insured operates to satisfy only the part of the claim owned by the insured. Because only the part of the claim owned by the insured is satisfied, the part of the claim owned by the insurer remains unsatisfied and may be sued upon by the insurer. Thus, when a tortfeasor's insurer and the injured party enter into a settlement which neither involves the subrogated insurer as a party to the settlement nor provides for the payment of the subrogated insurer's subrogated interest, the tortfeasor fails to satisfy the part of the claim owned by the subrogated insurer.

See, also, *Blue Cross v. Fireman's Fund*, 140 Wis. 2d 544, 411 N.W.2d 133 (1987); *Georgia Highway Express Inc. v. United Parcel Service, Inc.*, 164 Ga. App. 674, 297 S.E.2d 497 (1982); *Farm Bureau Mut. Ins. Co. v. Orr*, 379 N.W.2d 596 (Minn. App. 1985); *Gattorna v. American States Ins. Co.*, 122 Ill. App. 3d 582, 461 N.E.2d 675 (1984).

In this case, Farmers and its insured, Ammoura, had notice of the plaintiff's subrogation claim. The settlement with Henry did not destroy the plaintiff's claim, and the judgment must be affirmed.

AFFIRMED.

FAHRNBRUCH, J., dissenting.

I respectfully dissent. In my opinion, subrogation clauses make medical pay coverage illusory. I would hold that

subrogation clauses are unenforceable for the reason that they are against public policy.

In its opinion, the majority suggests that subrogation clauses are valid "based on contract" reasoning. The majority then upholds a medical pay subrogation clause on the theory that the insured has "bargained" for the clause, and therefore the courts should enforce it.

Realistically, there is no "bargaining" for a contract of insurance. As the U.S. Court of Appeals for the Eighth Circuit has stated:

> Insurance contracts are prime examples of "contracts of adhesion" where the customer is required to "adhere" to the standard contract form. Insurers, due to their greater bargaining position, should not be allowed to use this as a wholesale method for controlling applicable law. Consideration should be given all circumstances involved before placing much emphasis on formalistic ritual.

(Citations omitted.) *American Service Mutual Insurance Company v. Bottum*, 371 F.2d 6, 12 (8th Cir. 1967).

In construing insurance contracts, courts must remember

> it is also well settled that insurance contracts, as *contracts of adhesion, are subject to careful judicial scrutiny to avoid injury to the public.* In the consideration of adhesion contracts, *the courts have a heightened responsibility to prevent the marketing of policies that provide unrealistic and inadequate coverage.*
>
> Any portion of an insurance contract which is violative of public policy is not enforceable.

(Emphasis supplied.) (Citations omitted.) *Brown-Spaulding v. Intern. Surplus Lines,* 254 Cal. Rptr. 192, 194 (Cal. App. 3d 1988).

While a majority of jurisdictions permit insurance carriers to subrogate medical expenses, several jurisdictions have found subrogation clauses to be invalid. See, *Harleysville Mutual Insurance Company v. Lea*, 2 Ariz. App. 538, 410 P.2d 495 (1966); *Travelers Indemnity Company v. Chumbley*, 394 S.W.2d 418 (Mo. App. 1965); *Allstate Ins. Co. v. Druke*, 118 Ariz. 301, 576 P.2d 489 (1978); *Maxwell v. Allstate Ins. Co.*, 102 Nev. 502, 728 P.2d 812 (1986); *Allstate Ins. Co. v. Reitler*, 628

P.2d 667 (Mont. 1981); *Wrightsman v. Hardware Dealers Mutual Fire Insurance Company*, 113 Ga. App. 306, 147 S.E.2d 860 (1966); *Peller v. Liberty Mut. Fire Ins. Co.*, 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963).

One reason a person buys insurance is to make certain that he is fully compensated for any injuries he receives. Where a medical pay clause in an automobile insurance policy requires that the insurer be reimbursed first from any money the insured receives by way of settlement or verdict from a tort-feasor, the insured may not be fully compensated for his medical expenses, let alone his injuries, pain, suffering, and loss of wages and earning capacity. This is in spite of the fact that there appears to be sufficient insurance to cover medical expenses and attorney fees.

In Nebraska, Neb. Rev. Stat. §§ 60-501 and 60-534 (Reissue 1988) requires liability insurance of only $25,000 for bodily injury or death of one person in one accident, or $50,000 for bodily injury or death of two or more persons in one accident. Assume, for the purpose of argument, that a nonnegligent injured person's automobile insurance policy includes medical coverage on the insured of $15,000. The insured incurs $31,675 in medical expenses and receives the $15,000 policy amount from his insurer. This nonnegligent person then obtains a verdict for $25,000 and collects that amount from the tort-feasor's insurer. The tort-feasor is otherwise judgment-proof. From the $25,000, the injured person must pay his own attorney $8,325 (one-third contingent fee) and must also reimburse his own insurance company $15,000, leaving him with $1,675. Add back the $15,000 the insured received from his own medical pay policy, and the insured nets $16,675. When that amount is deducted from the amount of medical expenses, the insured still owes $15,000 in medical bills. Even if the medical pay insurer paid its share of the attorney fee involved, the insured would still owe $10,000. If we would hold that the reimbursement clause in the insured's medical pay policy is void, the injured insured would net $31,675 and would at least be fully compensated for his medical expenses. As the law now stands, the injured person gains nothing from his medical pay policy, even though he has paid premiums for what

could be several years.

Another policy consideration exists for holding a reimbursement clause in a medical pay case invalid. In jury-tried or even bench-tried cases, the trier of fact must determine (1) whether the medical expenses specially pleaded are necessary and (2) if the charges therefore are reasonable. Perhaps the jury decides that some of the medical services provided were not necessary or the cost of them is unreasonable. The jury returns a general verdict. Without an additional lawsuit, how will it be determined what amount the medical pay insurer should be paid from the general verdict? Should the tort-feasor's insurance carrier have to litigate which portion of the general verdict should be paid to the medical pay carrier? No, the tort-feasor's insurance carrier simply claims that it is a stakeholder and pays the amount of the verdict into the court. If the tort-feasor settles with the plaintiff, it does so at its own peril if we hold the reimbursement clause to be valid. The medical pay insurer can hold up the settlement, and we still have a lawsuit. See *Hamilton v. Farmers Insurance*, 107 Wash. 2d 721, 733 P.2d 213 (1987). *Hamilton* is an underinsured case, but it dramatically reflects how a settlement can be undermined by an injured party's own insurance company. The Washington court did not permit that to happen in *Hamilton*.

Subrogation clauses make medical pay clauses illusory. The policy owner receives nothing for paying a separate premium for medical expense coverage when a tort-feasor is liable for his damages.

Under the majority opinion adopted today, insurance companies are given the unbridled right to include subrogation clauses in their adhesion contracts of insurance. I fear that it will not be long before the same types of clauses are placed in other types of medical attendance and hospitalization policies.

Public policy requires that insurance companies deliver what has been paid for by the insured and that the insured receives more than illusory coverage.

WHITE and GRANT, JJ., join in this dissent.

ROBERT K. OLSON, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

441 N.W.2d 149

Filed June 9, 1989. No. 87-229.

1. **Administrative Law: Appeal and Error.** In an error proceeding involving an administrative agency decision, both the district court and the Supreme Court review the record to determine whether the agency acted within its jurisdiction and whether there is relevant evidence to support the decision.
2. **Administrative Law: Evidence: Appeal and Error.** Evidence is sufficient to support an administrative agency's decision if the agency could reasonably find the facts as it did based on the testimony and exhibits contained in the record.
3. **Administrative Law: Appeal and Error.** In an error proceeding to review a decision by an administrative agency, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
4. **Evidence: Jury Instructions: Appeal and Error.** As a general rule, errors in the admission of evidence may be cured by an instruction from the court.
5. **Criminal Law: Trial: Administrative Law: Appeal and Error.** Motions for separate trial in criminal cases are addressed to the discretion of the trial court, and rulings on such motions will not be reversed unless there is an abuse of discretion. This standard should also be applied to appeals from administrative agency hearings.
6. **Joinder: Proof: Appeal and Error.** In general, the person questioning the joinder of hearings bears the burden of showing the manner in which he was prejudiced by the joinder.
7. **Administrative Law: Evidence: Witnesses: Appeal and Error.** The credibility of witnesses and the weight to be given to the evidence presented are determinations to be made by the administrative agency as the trier of fact; it is not the province of the Supreme Court to resolve conflicts in the evidence.

Appeal from the District Court for Douglas County: MARK J. FUHRMAN, Judge. Affirmed.

Donald W. Kleine, of Kleine Law Office, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

FAHRNBRUCH, J.

Former Omaha Deputy Chief of Police Robert K. Olson appeals an order of the Douglas County District Court affirming the Omaha Personnel Board's termination of his

employment.

Olson claims the district court erred in not finding the Omaha Personnel Board (Board) erred (1) in admitting the results of a polygraph test of a hostile codefendant at a joint hearing; (2) in consolidating his appeal with the appeal of a codefendant when it was known the codefendant would place the entire blame for any wrongdoing on Olson and when evidence to be admitted in the codefendant's appeal would be inadmissible and prejudicial to Olson's appeal; and (3) in terminating Olson's employment, which was excessive punishment. We affirm.

In an error proceeding involving an administrative agency decision, both the district court and the Supreme Court review the record to determine whether the agency acted within its jurisdiction and whether there is relevant evidence to support the decision. *Wadman v. City of Omaha,* 231 Neb. 819, 438 N.W.2d 749 (1989); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988). Evidence is sufficient to support an administrative agency's decision if the agency could reasonably find the facts as it did based on the testimony and exhibits contained in the record. *Wadman v. City of Omaha, supra*; *Trolson v. Board of Ed. of Sch. Dist. of Blair, supra*. In an error proceeding to review a decision by an administrative agency, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Wadman v. City of Omaha, supra*; *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986).

This appeal arises out of an internal police investigation concerning the arrest of John Howell for driving while intoxicated. At the time of Howell's arrest, his brother-in-law was the mayor of Omaha. Howell's father was Douglas County treasurer. In the course of a joint gambling investigation by the Omaha Police Division and the Federal Bureau of Investigation, Howell was observed driving erratically at times and was suspected of driving while intoxicated. As a result of these observations, a determination was made by some of the upper echelon of the Omaha Police Division to institute surveillance of Howell and to arrest him for driving while

intoxicated if probable cause existed. Olson was not among those making the decision. The FBI expressed an interest in monitoring the charge through the court process to determine if anyone attempted to influence the outcome of the case. There is no indication any such monitoring actually occurred.

To avoid discovery of the ongoing gambling investigation, it was decided that the surveillance of Howell would be conducted by the uniform patrol division of the Omaha Police Division. Lt. Timothy Dunning, the Omaha police officer in charge of the gambling investigation, contacted Lt. Anthony Infantino, the officer in charge of the D shift of the uniform patrol division, concerning the surveillance. At that time, Dunning told Infantino that he assumed Infantino's supervisor, Deputy Chief Olson, had been informed of the surveillance. Infantino said he would contact Olson regarding the request.

Infantino developed the surveillance plan. He decided to use two uniformed officers, James Alexander and Tom Martin. They had been involved in previous undercover operations. Officer Alexander was also familiar with Howell from previous investigations. Infantino testified he discussed the plan at least three times with Olson before the arrest occurred. Infantino said Olson knew the plan involved the use of the uniformed officers (one of whom operated in plain clothes), the use of marked and unmarked police cars, and the use of low frequency radios to avoid detection. Infantino testified Olson knew the officers were operating outside their assigned areas. On the sixth night of surveillance, Howell was arrested for driving while intoxicated.

Several months later, Officer Alexander contacted the vice president of the police union, John Bober, and expressed his concerns about the surveillance operation. The complaint was taken to Public Safety Director Keith Lant, who initiated the internal investigation.

During the course of the investigation, Olson was interviewed twice, once by Tom Marfisi, the labor relations director for the City of Omaha, and once by Robert Wadman, the Omaha chief of police. Both Marfisi and Wadman testified Olson denied having knowledge of the plan which led to Howell's arrest. Olson corroborated Marfisi's testimony in this

regard. After the investigation was complete, the investigators determined Olson lied during the investigation and that Olson had been informed from the beginning concerning the surveillance and arrest of Howell.

Following an initial administrative hearing, Olson received a letter from the Omaha personnel director, dated November 7, 1986, informing him that his employment with the City of Omaha was being terminated, following a 15-day suspension without pay. The letter stated the reason for the termination was:

> During your interview you denied any knowledge of the surveillance of John Howell, and subsequent statements by other officers interviewed during the investigation showed that you were, in fact, knowledgeable of the surveillance, the existence of a plan of surveillance of Mr. Howell, the use of unmarked undercover vehicles and the use of uniform personnel to conduct a surveillance.

Olson appealed his termination to the Board. His hearing was consolidated with appeal hearings of Lieutenants Dunning and Infantino. They were being disciplined for their participation in the surveillance and arrest of Howell and for misconduct during the investigation. Olson objected to consolidation of the hearings because Infantino would be a witness against Olson, and results of a polygraph examination taken by Infantino were to be admitted into evidence pursuant to a stipulation between Infantino and the City of Omaha. Olson's objections were overruled, and the hearing was held December 4 through 8, 1986. Following the hearing, the Board unanimously affirmed Olson's dismissal.

Olson filed a petition in error with the Douglas County District Court, basically raising the same issues as are raised before this court. The district court found no error existed in the Board's proceedings and affirmed Olson's suspension and termination. Olson then appealed to this court.

Olson's first assignment of error claims the Board erred in admitting the results of Infantino's polygraph test at the joint hearing. We have held, at least in criminal cases, that due to their unreliability, results of polygraph tests may not be received in evidence. See, *State v. Anderson and Hochstein*, 207 Neb.

51, 296 N.W.2d 440 (1980); *State v. Steinmark*, 195 Neb. 545, 239 N.W.2d 495 (1976). The cases here are civil in nature. In Infantino's case, the test results were received in evidence by stipulation of Infantino and the City of Omaha. Thus, neither Infantino nor the City of Omaha could object to the test results' being admitted in evidence. See *American Oil Co. v. City of Omaha*, 182 Neb. 532, 155 N.W.2d 805 (1968).

We must now determine whether the admission of the test results in Infantino's case was prejudicial to Olson. It should be noted that the results of Infantino's polygraph test were not admitted in evidence in Olson's appeal. The record clearly shows the test results were admitted only in relation to Infantino's hearing. Olson argues that the results of the test, indicating Infantino was truthful in his statements that Olson knew of the plan, buttressed the evidence against Olson, which he claims consisted only of Infantino's testimony. Olson argues the limiting instructions given to Board members by the Board's chairman were insufficient to correct the error caused by admitting the polygraph results.

When the results of Infantino's polygraph test were offered into evidence, the chairman of the Board clearly instructed the Board on the limited admissibility of the evidence, stating the polygraph test results "will be accepted [into] evidence *as it relates to the case of Anthony L. Infantino only,* and will not be considered as evidence in any other matter . . . ." (Emphasis supplied.) The admonition was repeated on two other occasions during the hearing. As a general rule, errors in the admission of evidence may be cured by an instruction from the court. *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986). See *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Olson has made no showing, and there is no indication in the record, that the Board's members failed to follow the chairman's admonitions. In view of the chairman's admonitions, we cannot say that the admission of the polygraph test results in Infantino's case was prejudicial to Olson. If there was any error in their admission, it was harmless and cured by the chairman's admonitions. There was more than ample other evidence upon which the Board could determine Infantino's credibility without having to resort to the polygraph tests.

Olson's second assignment of error claims the Board erred in consolidating his appeal with Infantino's appeal when it was known Infantino would place the entire blame for any wrongdoing on Olson and when evidence (the polygraph test results) to be admitted in Infantino's appeal was inadmissible and prejudicial to Olson. We have consistently held motions for separate trial in criminal cases are addressed to the discretion of the trial court, and rulings on such motions will not be reversed unless there is an abuse of discretion. *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (1968); *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968). This standard should also be applied to appeals from administrative agency hearings.

In general, the person questioning the joinder of hearings bears the burden of showing the manner in which he was prejudiced by the joinder. *State v. Anderson and Hochstein, supra*. The only prejudice which Olson claims to have occurred as a result of the joinder arose from the introduction of the results of Infantino's polygraph tests. As stated earlier, no prejudice resulted from the admission. Therefore, the Board did not abuse its discretion in joining the appeal hearings of Olson, Infantino, and Dunning.

Olson's final assignment of error claims terminating Olson's employment amounted to excessive punishment. This argument is based on a claim that there was insufficient evidence to support the Board's finding that Olson lied during the internal investigation about his knowledge of the plans to observe and the surveillance of Howell. Olson maintains the only evidence showing he knew of the arrest plan is "incredible." The credibility of witnesses and the weight to be given to the evidence presented are determinations to be made by the administrative agency as the trier of fact; it is not the province of the Supreme Court to resolve conflicts in the evidence. *IBEW Local 244 v. Lincoln Elec. Sys.*, 222 Neb. 550, 385 N.W.2d 433 (1986).

At the hearing, Infantino testified he had at least three meetings with Olson prior to the Howell arrest. In one meeting, Infantino informed Olson of the details of the surveillance plan. In another meeting, held after 4 days of surveillance, Olson told Infantino to continue the surveillance for 2 or 3

more weeks, Infantino testified.

Public Safety Director Lant and Lieutenant Dunning testified it would be standard procedure for Lieutenant Infantino to obtain the affirmance of his superior officer after receiving a request from another division, especially when the request involved an assignment of this magnitude. Finally, there was evidence that around the time of Howell's surveillance, Olson was the next superior officer available in Infantino's chain of command. There is substantial relevant evidence in the record upon which the Board could determine that Olson knew of the arrest plan and lied during the internal police investigation.

We affirm the rulings of the Douglas County District Court and the Omaha Personnel Board, which terminated Olson's employment with the City of Omaha.

AFFIRMED.

AMERICAN COMMUNITY STORES CORPORATION, A TEXAS CORPORATION, ET AL., APPELLEES, V. M. J. NEWMAN, TRUSTEE, ET AL., APPELLANTS.

441 N.W.2d 154

Filed June 9, 1989. No. 87-540.

1. **Summary Judgment.** The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment.
2. _____. Summary judgment is an extreme remedy that should be awarded only when an issue is clear beyond all doubt. It is proper when pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Contracts: Assignments: Leases.** An assignment of an interest in a lease which prohibits such assignment without the lessor's consent generally is ineffective without such consent.
4. _____: _____: _____. In this state, covenants in a lease against assignment or subletting are not favorably regarded by the courts and are liberally construed in favor of the lessee.

5. **Contracts: Assignments: Leases: Landlord and Tenant.** If by a transaction in which an interest in a lease is transferred the tenant conveys the entire terms and thereby parts with all reversionary interest in the property, the transaction is construed to be an assignment, whereas if there remains a reversionary interest in the estate, it is normally a sublease.
6. **Contracts: Assignments: Leases.** Upon the transfer of an interest in a lease if the original tenant reserves a right of reentry, that is a reversionary interest sufficient to qualify such transfer of rights as a sublease rather than an assignment.
7. **Contracts: Leases.** As a general rule, the retained reversionary interest in a transfer of an interest in a lease need not be for a substantial period of time in order to be considered a sublease.
8. _____: _____. In this state, a sublessee has no greater rights against the original lessor than were given by the original sublessor to the original sublessee.
9. _____: _____. Under a sublease there is no privity of contract between the original lessor and the sublessee.
10. **Contracts: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Richard S. McMillin, of Marks & Clare, for appellants.

Theodore J. Stouffer and Kurt F. Tjaden, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

HASTINGS, C.J.

This appeal involves three cases consolidated for trial, briefing, and argument. Plaintiffs, tenants under three separate leases for buildings housing grocery stores, filed petitions for declaratory judgments against the defendants, trustees for the landlords of those various premises. Plaintiffs sought a determination as to whether they violated the terms of the individual store leases which prohibit assignment of the leases without the prior written consent of the landlord, but permit subletting without permission.

Defendants counterclaimed for possession based on alleged assignments of the leases without prior written consent. Both parties filed cross motions for summary judgment. Defendants now appeal from the order of the trial court ruling that the

leases had not been violated because no prohibited assignments had been entered into which remained in effect beyond the period which existed for the curing of defaults as provided for in the leases. Summary judgments were granted in favor of the plaintiffs, and defendants' counterclaims were dismissed.

Defendants assign three errors, which, simply stated, allege that the leases had been assigned without permission, which constituted defaults in the terms of the leases. We affirm.

The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987).

Summary judgment is an extreme remedy that should be awarded only when an issue is clear beyond all doubt. It is proper when pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts, and when the moving party is entitled to judgment as a matter of law. *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989); *Schroer v. Synowiecki*, 231 Neb. 168, 435 N.W.2d 875 (1989). In reviewing a summary judgment, this court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Five Points Bank v. White, supra*; *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989).

The facts are not particularly complicated, but are somewhat voluminous. However, for our purposes it will suffice to shorten them considerably.

American Community Stores Corporation (ACS), which operated Hinky Dinky stores in Nebraska, held leases with the various landlords on grocery store buildings in Columbus, Auburn, and Omaha. The leases generally were for 20-year terms with options to renew or extend for multiple 5-year leasing periods. Due to labor difficulties, ACS announced sometime in January of 1985 that it was closing its stores in Nebraska. The Columbus store was closed at the beginning of December 1984, and the Auburn and Omaha stores in

mid-February of 1985. Each store was reopened under different management the day after it closed. The Auburn store was reopened and operated by Hinky Dinky Auburn, Inc., the Columbus store was reopened and operated by Russ' Super Foods, Inc., and the Omaha store was reopened and operated by Gro-Mor, Inc.

The agreements between ACS and the various parties were originally structured such that ACS would assign the leases to Nash-Finch Company, a grocery wholesaler, and Nash-Finch would in turn sublease the stores to the operators. Assignment agreements were signed and placed in the files of the companies.

Shortly after the public announcement of the closings, ACS, through its owner, Cullum Companies, Inc., contacted the trustees for the landlords, requesting permission to assign leases to Nash-Finch. In the case of the Columbus store, a representative of Nash-Finch wrote the trustee a letter dated December 31, 1984, giving notice of the assignment between ACS and Nash-Finch effective December 1, 1984, and of the fact that Nash-Finch was subletting the store to Russ' Super Foods.

By separate letter for each store, each letter dated February 8, 1985, one of the trustees for the landlords notified ACS that the landlord did not consent to assignment of the leases for the Auburn and Omaha stores. Furthermore, if ACS proceeded to assign the lease without written consent, the letter was to constitute the notice of default required in article X of each lease. By separate letter also dated February 8, the trustee notified ACS that unless he heard otherwise from ACS within 2 weeks, he would assume that the transfer of the Columbus store to Nash-Finch was by assignment without consent. In the event Nash-Finch's possession was by assignment, the letter was notice of default. Houston E. Holmes, Jr., vice president and general counsel of Cullum Companies, Inc., notified the trustee for the landlords by letter dated February 14, 1985, that the stores would be *sublet*.

Article IX of each of the leases provided in part:

> SECTION 1. Tenant may not assign or transfer this lease without the written consent of Landlord first had

> and obtained; however, without obtaining such consent, Tenant may sublet the leased premises or portions thereof for purposes and upon provisions not inconsistent with the terms and provisions of this lease.

Article X of the same leases provides:

> SECTION 1. If, at any time during the term of this lease . . . (a) Tenant shall default . . . (ii) In the observance or performance of any of Tenant's other covenants, agreements or obligations hereunder for a period of twenty (20) days after Landlord shall have given Tenant written notice specifying such default or defaults . . . Landlord shall have the right, at its election, at any time thereafter while such default or defaults continue, to re-enter and take complete and peaceable possession of the leased premises . . . and to declare said term ended . . . .

In an apparent effort to cure these claimed defaults, Jon Solberg, in-house counsel for Nash-Finch, and Holmes, on behalf of ACS, agreed during a telephone conversation in mid-February that the assignment agreements would be removed from the various files and replaced with subleases.

The term of each sublease ends 2 days prior to the end of ACS's term under the prime lease with the defendants. In addition, Nash-Finch, as sublessee, was granted the right to "exercise the remaining option periods granted by the Prime Lease."

In granting plaintiffs' motion for summary judgment, the trial court made the following findings of fact:

> 1. That although there may be a question of fact as to whether an assignment was executed and then destroyed prior to closing of the sale, a sublease was executed thereafter and within 20 days of notice of default given by defendant.
>
> 2. That the sublease agreement executed is in fact and law a sublease and not an assignment and therefore does not require the consent of the defendant and is not in violation of any provisions of the original lease. This conclusion is based upon the following:
>
> a) The original lease permitted a sublease for all as well as a portion of the leased premises.

b) The sublease expired prior to the term of the original lease thus retaining in the lessee a right of reversion.

c) The lessee retained a right of reentry for a condition broken which is also a right of reversion.

d) The fact that options given to the sublessee would purport to run as long if not longer than the expiration of the original lease is not, as a matter of law, valid so as to make the sublease for the same term as the original lease. The option can only begin to run from the expiration of the basic term of the sublease, not the original lease. Further, the sublessee cannot be granted more than the prime lessee has to offer under the original lease.

Appellants argue that the original assignments are still in effect because there is nothing in the record that the agreements were canceled or altered. They further argue that even though the assignment documents were destroyed, which fact is not disputed, they still bind ACS and Nash-Finch because they were never formally rescinded or the subject of reassignment from Nash-Finch to ACS.

That reasoning is erroneous. In Nebraska, an assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent is ineffective without such consent. *Moritz v. S & H Shopping Centers, Inc.*, 197 Neb. 206, 247 N.W.2d 454 (1976). See, also, *K. & J. Markets, Inc. v. Martin Packing Corp.*, 20 N.J. Super. 515, 90 A.2d 507 (1952); *Karidis et al. v. Trampas*, 207 Ill. App. 302 (1917); *Austin v. Harris & another*, 76 Mass. (10 Gray) 296 (1858). In *Moritz v. S & H Shopping Centers, Inc., supra*, this court stated:

> Defendant had no authority to assign the lease without the consent of plaintiff. Such consent was never given or received and defendant's contention that it transferred certain interests in the lease is necessarily immaterial as no valid rights could have been transferred or acquired in the absence of plaintiff's consent.

197 Neb. at 209, 247 N.W.2d at 456.

The assignments between ACS and Nash-Finch were not valid because the landlords refused to consent to them, and therefore they are not still in effect in continuing violation of the leases. It was not necessary for the parties to formally

rescind the assignments or for Nash-Finch to reassign the leases to ACS before the parties could attempt to enter into valid subleases.

Nevertheless, the assignments without consent, even though invalid, were still violations of the covenants in the leases. However, appellants overlook the fact that the leases provided ACS with 20 days to cure a default after being notified of the default by the landlord. This was done if, in fact, the documents later executed were subleases.

In Nebraska, covenants in a lease against assignment or subletting are not favorably regarded by the courts and are liberally construed in favor of the lessee. *Jamson v. Poulos*, 184 Neb. 480, 168 N.W.2d 526 (1969); *Chesnut v. Master Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947). This means that the scope of a covenant against assignment will not be enlarged by the courts, and the covenant will not be considered violated by any technical transfer that is not fairly and substantially an assignment. *Chesnut v. Master Laboratories, supra.*

The generally accepted test for determining whether a transfer is an assignment or a sublease is set out in 2 R. Powell, The Law of Real Property, ¶ 246[1] at 372.92-.93 (1986), as follows:

> When the transfer is for the whole balance of the unexpired term, with respect to all of the originally leased premises and on exactly the same terms as those under which the main lessee held the transaction is inescapably an "assignment." When the transfer is for a period shorter than the unexpired balance of the term, and relates to a physical part only of the originally leased premises and is on terms materially different from those stipulated in the main lease, the transaction is inescapably a "sublease." To state the test in a slightly different manner, the question is whether if by the transaction the lessee conveys his entire term, or whether he retains a reversionary interest. If by the transaction the tenant conveys the entire terms and thereby parts with all reversionary interest in the property, the transaction is construed to be an assignment, whereas if there remains a reversionary interest in the estate, it is a

sublease.

Appellants contend that the subleases are really assignments because ACS did not reserve a reversionary interest at the end of the option terms. According to appellants, contrary to the trial court's ruling, the right of reentry for condition broken is not a reversionary interest. See, *Rocklen, Inc. v. Radulesco*, 10 Conn. App. 271, 522 A.2d 846 (1987); *Shadeland Development Corp. v. Meek*, 489 N.E.2d 1192 (Ind. App. 1986); *State v. Meador*, 60 Wash. 2d 543, 374 P.2d 546 (1962); *C. N. H. F., Inc. v. Eagle Crest Dev. Co.*, 99 Fla. 1238, 128 So. 844 (1930); *Davidson v. Minnesota Loan & Trust Co.*, 158 Minn. 411, 197 N.W. 833 (1924); *Sexton v. Chicago Storage Co. et al.*, 129 Ill. 318, 21 N.E. 920 (1889); *Stewart v. Long Island R. R. Co.*, 102 N.Y. 601, 8 N.E. 200 (1886). However, there is authority for the position that the right of reentry is a reversionary interest sufficient to qualify a transfer as a sublease rather than an assignment. See, Restatement (Second) of Property § 15.1, comment *i.* (1977); *Spears v. Canon de Carnue Land Grant*, 80 N.M. 766, 461 P.2d 415 (1969); *Novosad v. Clary*, 431 S.W.2d 422 (Tex. Civ. App. 1968); *Venters v. Reynolds*, 354 S.W.2d 521 (Ky. 1962); *Lebel v. Backman*, 342 Mass. 759, 175 N.E.2d 362 (1961); *Coles Trading Co. v. Spiegel, Inc.*, 187 F.2d 984 (9th Cir. 1951); *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P.2d 1163 (1937); *Saling v. Flesch et al.*, 85 Mont. 106, 277 P. 612 (1929).

We adopt the reasoning of the latter authorities and declare that a right of reentry is a reversionary interest sufficient to qualify a transfer of rights under a lease agreement as a sublease rather than an assignment.

Quite apart from the question of the right of reentry, ACS did retain a reversionary interest by reason of the expiration of the term of the sublease prior to that of the basic lease. It is generally accepted that the retained reversionary interest need not be for a substantial period of time in order for an agreement to be considered a sublease. Agreements calling for the surrender of possession only 1 day prior to the expiration of the term of the main lease have been held to be subleases rather than assignments. See, *Bostonian Shoe Co. of New York v. Wulwick Associates*, 119 A.D.2d 717, 501 N.Y.S.2d 393 (1986);

F.W. Woolworth Co. v. Plaza North, Inc., 493 N.E.2d 1304 (Ind. App. 1986); *Warnert v. MGM Properties*, 362 N.W.2d 364 (Minn. App. 1985).

In each agreement at issue in this appeal, Nash-Finch's tenancy ends 2 days prior to the end of ACS's tenancy under the prime lease. Under the common-law distinction between assignments and subleases, this is a sufficient reversionary interest to constitute the transfer a sublease.

Appellants argue that even though the agreements between ACS and Nash-Finch reserve a portion of the initial term to ACS, the so-called subleases between Nash-Finch and its operators are contractually inconsistent; i.e., the Auburn and Omaha subleases between Nash-Finch and the operators provide for termination of the operator's lease on the same day that ACS's term expires under the prime lease. Appellants insist that this is evidence that the real intent of ACS and Nash-Finch was to assign the leases. Contrary to this contention, it seems only to indicate that the subleases between Nash-Finch and the operators were not changed to reflect the change from assignments to subleases between ACS and Nash-Finch.

In Nebraska, a sublessee has no greater rights against the original lessor than were given by the original sublessor to the original sublessee. Thus, despite the provisions in the subleases between Nash-Finch and the operators of the Omaha and Auburn stores, the tenancy of the operators will end when the term of Nash-Finch ends, 2 days prior to the expiration of ACS's term under the prime lease.

Appellants also contend that ACS transferred the premises for the entire remainder of its term because it granted Nash-Finch the right to exercise the remaining renewal options in the prime lease. It is reasonable to conclude that ACS was granting Nash-Finch options to renew the subleases in order to extend their terms by 5 years each for the number of times ACS could extend the prime lease, rather than granting Nash-Finch the right to actually extend the prime lease pursuant to ACS's option to renew. Since under a sublease there is no privity of contract between the original lessor and the sublessee, Nash-Finch as sublessee could not exercise ACS's option to renew. See, generally, *Neal v. Craig Brown, Inc.*, 86 N.C. App.

157, 356 S.E.2d 912 (1987); *Ducote v. Callico*, 307 So. 2d 644 (La. App. 1974); 50 Am. Jur. 2d *Landlord and Tenant* § 1195 (1970); Annot., 39 A.L.R.4th 824 (1985).

In *F.W. Woolworth Co. v. Plaza North, Inc., supra*, the court found that an agreement which allowed the transferee to occupy the premises during the extended period of a renewable prime lease permitting the original lessee to extend the lease for five successive terms of 5 years, which gave the transferee options to extend, and which expired 1 day before the expiration of the second and third extended periods of the prime lease, was a permitted sublease and not a prohibited assignment. The facts in that case as to the extension options are strikingly similar to the instant case.

To the same effect is *Joseph Bros. Co. v. F.W. Woolworth Co.*, 641 F. Supp. 822 (N.D. Ohio 1985), *aff'd* 844 F.2d 369 (6th Cir. 1988). The issue also facing that court was whether the agreement constituted an assignment or a sublease. According to the court,

> [t]he effect of the agreement was that each term of the Woolco-Hills agreement expired one day before the expiration of the corresponding term of the Joseph Brothers-Woolco agreement. If each party extended its lease to the limits, the Joseph Brothers-Woolco lease would expire one day after the Woolco-Hills lease.

Id. at 824.

The court noted that once a lease renewal option has been exercised, the term of the original lease is deemed to be enlarged to encompass the option period. Therefore, the issue was whether the same was true if a sublease is entered into before the renewal option is exercised. The court found that Woolco clearly acted with the intention in good faith of exercising its option to extend the lease, evidenced by the fact that Woolco did so 1 month after the agreement with Hills and 5½ years before it was necessary. Accordingly, the court found that "reasonable minds could only conclude that it was the intention of Woolco to sublease the premises to Hills, that Woolco made a good faith attempt to enter into a sublease, and that the agreement meets the legal requirements to constitute it as a sublease rather than an assignment." *Id.* at 825.

Recently, this court in *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 438 N.W.2d 474 (1989), reiterated the well-established law in this state that "the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence." *Id.* at 803, 438 N.W.2d at 478, quoting *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 418 N.W.2d 236 (1988). ACS and Nash-Finch, while engaged in the performance of the agreements, appear to have interpreted the renewal option to mean Nash-Finch will inform ACS if it wishes to extend the term and ACS in turn will then exercise its option under the prime lease by notifying the landlord. Nash-Finch's right to extend the subleases is dependent upon ACS's exercise of its options to renew the prime leases. The effect is that each term of the subleases expires 2 days before the expiration of the corresponding term of the prime lease. If ACS and Nash-Finch each extend their leases to the limits, the prime leases will expire 2 days after the subleases.

Appellants cite to this court the rule of *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951), that the intention of the parties is to govern in determining whether an instrument is an assignment or a sublease. According to appellants, if this court follows the *Jaber* rule, the intention of the parties is a question of fact, and therefore summary judgment was inappropriate.

Tennessee also follows the intention rule. The court in *Ernst v. Conditt*, 54 Tenn. App. 328, 390 S.W.2d 703 (1964), quoting *Williams v. Williams*, 84 Tenn. 164 (1885), stated, " 'We have most wisely abandoned technical rules in the construction of conveyances in this State, and look to the intention of the instrument alone for our guide, that intention is to be arrived at from the language of the instrument read in the light of the surrounding circumstances.' " 54 Tenn. App. at 337, 390 S.W.2d at 707. Furthermore,

> "It is the duty of the court in the construction of contracts to ascertain the intention of the contracting parties, understand what they meant by the contract, and give effect to such understanding and meaning. All other rules of construction are only aids or helps in establishing the

> intention of the parties and their mutual understanding of the meaning of their contract.
>
> "The motives which induced the contract have a definite bearing upon the intention of the parties. The object and purpose to be effected furnish valuable aids in ascertaining such intention."

Ernst, 54 Tenn. App. at 337-38, 390 S.W.2d at 707, quoting *Commerce Street Company v. Goodyear Tire & Rubber Company*, 31 Tenn. App. 314, 215 S.W.2d 4 (1948).

Reading the language of the agreements between ACS and Nash-Finch in the light of the surrounding circumstances and taking into consideration the motives which induced the agreement, the only reasonable interpretation of the agreements is that they are and were intended to be subleases. ACS was informed that the landlord would not consent to assignments and considered ACS to be in default. ACS, having the object and purpose of transferring its interest in the premises while not violating the leases and forfeiting its interest in the premises, clearly intended to enter into subleases, which it could do without permission. To this end, ACS entered into agreements that satisfy the common-law requirements of a sublease.

There is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn therefrom, and the appellees are entitled to judgment in their favor as a matter of law. The judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ALAN H. KIRSHEN, RESPONDENT.

441 N.W.2d 161

Filed June 9, 1989. No. 87-546.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible

evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: Proof: Appeal and Error.** In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence.
3. **Disciplinary Proceedings.** In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. **Disciplinary Proceedings: Due Process.** A lawyer is entitled to due process of law in a disciplinary proceeding.
5. **Due Process: Notice.** Due process requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.
6. **Disciplinary Proceedings: Due Process.** Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer.
7. **Attorney and Client.** A lawyer is ultimately responsible for the conduct of his employees and associates in the course of the professional representation of the client.
8. **Disciplinary Proceedings: Evidence: Appeal and Error.** In disciplinary action, which is a trial de novo on the record, the Supreme Court will not consider irrelevant evidence or evidence which was erroneously admitted.
9. **Res Judicata: Actions: Judgments.** The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. The doctrine rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
10. **Disciplinary Proceedings.** The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.
11. _____. Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.
12. _____. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.

Original action. Judgment of disbarment.

David L. Herzog, Special Prosecutor, for relator.

James L. Rold, of Rold & Peppard, for respondent.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and ENDACOTT, D.J.

PER CURIAM.

This is an original proceeding wherein the Nebraska State Bar Association (NSBA), relator, filed formal charges in this court against respondent, Alan H. Kirshen. The formal charges were based on three separate complaints made to the Counsel for Discipline for the NSBA. Counts I and II of the formal charges allege that respondent failed to timely respond to two of the complaints, in violation of Canon 1, DR 1-102, of the Code of Professional Responsibility. Count III alleges that respondent failed to act competently, failed to represent his client zealously, and charged an illegal or excessive fee in connection with an estate proceeding, in violation of DR 1-102; Canon 6, DR 6-101; Canon 7, DR 7-101; and Canon 2, DR 2-106, of the Code of Professional Responsibility.

These proceedings began before the Committee on Inquiry of the Second Disciplinary District (Committee) on charges filed on September 5, 1986, by Alison L. Larson, Assistant Counsel for Discipline. Five charges were originally filed before the Committee. The three counts tried before the Committee, and later formally charged, alleged that respondent (1) failed to act competently and failed to timely respond to a complaint made by Mrs. Roy Nuttelman; (2) failed to act competently and failed to timely respond to a complaint made by JaVee Suhr, a court reporter; and (3) neglected and failed to timely close the estate of Medalo Tapia and engaged in conduct that adversely reflected on his fitness to practice law in connection with the estate proceedings.

A hearing was held before the Committee on March 18, 1987, on the Nuttelman, Suhr, and estate of Tapia matters. On April 15, 1987, the Committee transmitted to the NSBA Disciplinary Review Board (Board) formal charges against the respondent.

The Board reviewed the record of the Committee hearing with respect to the allegations contained in the formal charges. On June 10, 1987, the Board determined that there were reasonable grounds for discipline and that a reprimand would

not be an appropriate remedy, and submitted the formal charges to this court.

On September 21, 1987, Larson was granted leave to withdraw as attorney for relator because it appeared she would be a witness at the hearing. David Herzog was appointed special prosecutor. On October 13, J. Terry Macnamara was appointed referee. The matter was heard before the referee on June 28 and 29, 1988.

The referee's report was filed on September 7, 1988, and recommended that respondent be suspended from the practice of law for 1 year. Respondent filed exceptions to the report, objecting to the report in numerous particulars and alleging constitutional, evidentiary, and other defects in these disciplinary proceedings.

Respondent further contends that the punishment recommended by the referee was too harsh. For the reasons stated hereinafter, we determine that respondent should be disciplined and that the sanction recommended by the referee was inadequate in view of respondent's actions.

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* ____ U.S. ____, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988). In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence. *Id.* In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *Id.*

COUNTS I and II

Count I of the formal charges alleges:

1. That on or about the 16th day of April, 1979, the

Respondent, Alan H. Kirshen, was duly admitted to the practice of law in the State of Nebraska, by the Supreme Court of the State of Nebraska.

2. That on or about April 30, 1986, the Counsel for Discipline received a written letter of complaint against the Respondent by Mrs. Roy Nuttelman.

3. That on or about May 1, 1986, the Respondent received notice that he was the subject of a complaint written to the Counsel for Discipline with an attached copy of Mrs. Nuttelman's complaint. Furthermore, the Respondent, pursuant to the Rules of Disciplinary Proceedings, was notified that he had fifteen (15) working days to send an appropriate written response to Mrs. Nuttelman's complaint to the Counsel for Discipline.

4. That the Respondent failed to timely file a response to the complaint of Mrs. Nuttelman with the Counsel for Discipline's Office.

That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office, as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

1. Violate a Disciplinary Rule.

[6]. Engage in any other conduct that adversely reflects on his fitness to practice law.

Count II of the formal charges alleges:

2. That on or about February 21, 1986, the Counsel for Discipline received a written letter of complaint against the Respondent by Ms. JaVee Suhr on behalf of Thibault, Suhr & Thibault, Inc., a free-lance court reporting firm.

3. That on or about February 21, 1986, the Assistant Counsel for Discipline wrote to the Respondent and requested a response to Ms. Suhr's letter of complaint. That on or about April 24, 1986, May 20, 1986, and June 11, 1986, the Assistant Counsel for Discipline again notified the Respondent by letter that he was the subject of

a complaint written to the Counsel for Discipline by Ms. Suhr and requested an immediate appropriate response.

4. That the Respondent failed to timely file a response to the complaint of Ms. Suhr.

As in count I, count II further alleges that respondent's actions constituted a violation of his oath of office as an attorney and were in violation of DR 1-102(A)(1) and (6).

In his first amended answer to formal charges, with respect to count I, respondent admitted paragraph 1 and denied paragraphs 2, 3, and 4. He affirmatively alleged with respect to count I that he had timely responded to any notices of complaints he received from and after February 21, 1986, and stated:

6. For further defense, Respondent denies that violation of a duly imposed procedural rule of this Court states facts sufficient to constitute a cause of action for violation of a substantive Disciplinary Rule of the Code of Professional Responsibility of the American Bar Association as adopted by this Court.

7. For further defense, Respondent alleges that Disciplinary Rules DR-102(A), (1 and 6), as pled by the State of Nebraska, Nebraska State Bar Association, District Two Committee on Inquiry are unconstitutionally vague and overbroad, as applied to Respondent, under both the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Constitution of the State of Nebraska.

As to count II, respondent denied paragraphs 2, 3, and 4. He affirmatively alleged that he responded to any notices of complaints he received from and after May 1, 1986, and stated:

6. For further defense, Respondent denies that violation of a duly imposed procedural rule of this Court states facts sufficient to constitute a cause of action for violation of a substantive Disciplinary Rule of the Code of Professional Responsibility of the American Bar Association as adopted by the Court.

7. For further defense, Respondent alleges that the District Two Committee on Inquiry found that the failure to pay a disputed deposition bill did not form the basis of a

substantive complaint against a member.

8. That such substantive complaint should have been dismissed if received by the Counsel on Discipline since such conduct, if true, has never been understood to form the basis of a disciplinary violation.

9. That the Counsel on Discipline, or his subordinates, employees and agents, if any were involved, exceeded their authority and duties under Rule 8 of the Disciplinary Rules of the Nebraska Supreme Court in pursuing Respondent over a disputed deposition bill.

Respondent attended law school at the University of Chicago from 1968 through 1971 and was admitted by examination to the Iowa bar. He spent 6 years "processing fraudulent things for the Federal Government." He was admitted to the bar in Nebraska on motion in 1979.

With respect to count I, the record shows that on April 30, 1986, Counsel for Discipline, Dennis G. Carlson, received a written complaint from Mrs. Roy Nuttelman, whom respondent formerly represented in a farm bankruptcy proceeding. Carlson forwarded the Nuttelman complaint to respondent on April 30, 1986, by certified mail. Carlson's letter further informed respondent that "[p]ursuant to Rule 9 (E) of the Rules of Disciplinary Proceedings, you are required to send to me an appropriate written response within the next fifteen (15) working days. If you fail to so respond, the Rules provide that this failure alone shall be grounds for discipline." The return receipt attached to Carlson's file copy indicated that this letter was received on May 1, 1986, by "R. Johnson," respondent's secretary.

By certified letter dated June 11, 1986, Larson informed respondent that as of June 11 the office of the Counsel for Discipline had not received his response to the Nuttelman complaint and that she intended to file charges against him immediately if a response was not received forthwith. The return receipt for this letter indicated it was received on June 12 by "R. Johnson."

At the June 28, 1988, hearing before the referee, Larson testified that the Committee chose to file charges related to respondent's failure to respond to the Nuttelman complaint,

but that there was discussion before the Committee about the substance of the complaint. Larson further testified that she did not receive a timely response to the Nuttelman complaint.

As to count II, the record shows that on February 20, 1986, the NSBA office of the Counsel for Discipline received a written complaint from JaVee Suhr of Thibault, Suhr & Thibault, Inc., court reporters. This complaint solicited "help and/or advice" in collecting several accounts receivable.

Larson forwarded this complaint to respondent by first-class mail on February 21, 1986. Her letter stated, "In my opinion, [Suhr's] letter does not set forth sufficient facts to file a complaint against you. I would appreciate, however, a written response from you addressing the issues raised."

Larson acknowledged before the referee that her letter of February 21 did not refer to a 15-day response period. She further testified that she elected to proceed under Neb. Ct. R. of Discipline 9(C) (rev. 1986) because under certain circumstances failure to pay a court reporter could constitute fraud or misrepresentation, although "on first blush" she felt there was no basis for a complaint regarding Suhr.

By letters dated April 24 and May 20, 1986, Larson informed respondent that her office had not received his response to the Suhr complaint and requested that he immediately send a written reply to the office of the Counsel for Discipline regarding the Suhr complaint.

Larson's certified letter of June 11, 1986, informed respondent that as of that date her office had not received a response to the Suhr complaint and that if a response were not received immediately, she would "have little choice but to file Charges against you with the District Committee on Inquiry." The return receipt shows that this letter was received by "R. Johnson" on June 12.

Larson testified before the referee that she had a telephone conversation with respondent on June 24, 1986, regarding the Suhr complaint. During that conversation she advised respondent that she had not received a response to the Suhr complaint and was not giving him an extension, but that if he responded she would review his response. Respondent advised Larson that a response would be in shortly, but did not say that

he had already responded. Larson testified that she did not receive a response to either the Nuttelman or Suhr complaint until shortly before the Committee hearing in March 1987, when respondent brought in "what were purported to be or were his responses" to those complaints.

Copies of a June 14, 1986, response to the Suhr complaint and a June 30, 1986, response to the Nuttelman complaint were attached to respondent's answer to the charges before the Committee. The answer was apparently received by the NSBA office of the Counsel for Discipline on November 1, 1986. Whether the respondent's replies to the two complaints were originally attached to his answer is not clear. It is clear, however, that no responses were received by Counsel for Discipline until March 1987.

Respondent was represented by counsel at the June 1988 hearing before the referee. Respondent testified as to his personal problems, overwork, and extensive travel in 1986 and that he was not in his office on a daily basis commencing May or June of that year. He became aware that his secretary, Ricki Johnson, often neglected to do the work he gave her and did not perform her duties while he was out of town, but he did not fire her because he did not want to train another secretary. Respondent also testified that Johnson took some of his files from the office while he was out of town after she had difficulty cashing one of her paychecks.

Respondent testified that after Johnson quit in August 1986, a new secretary discovered a bundle of documents belonging to respondent, including his responses to the Nuttelman and Suhr complaints. These responses were dated June 30, 1986, and June 14, 1986, respectively, but respondent testified the dates on the letters might not reflect either the date the letters were dictated or the day they were mailed. Respondent did recall receiving Larson's June 11, 1986, letter regarding the Nuttelman complaint and Larson's certified letter of June 11, 1986, demanding an immediate response to the Suhr complaint.

At the hearing before the referee, Elizabeth Kountze, an attorney who shared an office with respondent, testified as to Johnson's general incompetence. Kountze stated that she would not allow Johnson to do work for her. She also testified that

after the new secretary was hired, they discovered old mail and notes which had been placed between two books on a table. Kountze did not read the mail, but noted that many of the items belonged to respondent.

As to counts I and II, the referee found that Counsel for Discipline did not receive responses to the Nuttelman and Suhr complaints, that respondent violated DR 1-102 in failing to respond to Counsel for Discipline, and that respondent violated DR 1-102(A)(6) in that he failed to provide management, supervision, and control of his office staff and procedures, which adversely reflected on his fitness to practice law.

Respondent first objects to the referee's finding that he violated DR 1-102(A)(6) by failing to provide management, supervision, and control of his office staff and procedures, contending that DR 1-102(A)(6) is unconstitutionally vague in failing to specify conduct or the nature of specific action which will result in sanctions. Respondent also claims that various procedural and substantive due process violations occurred at virtually every stage of these proceedings.

A lawyer is entitled to due process of law in a disciplinary proceeding.

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. . . . He is accordingly entitled to procedural due process, which includes fair notice of the charge. . . . [O]ne of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment [in federal court] is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process."

In re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

> "The term 'due process of law' has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs . . . but is satisfied by a proceeding applicable to the subject-matter and

> conformable to such general rules as affect all persons alike."
>
> . . . "Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained."

State ex rel. Nebraska State Bar Assn. v. Jensen, 171 Neb. 1, 28-29, 105 N.W.2d 459, 476 (1960). This court has held: "Due process requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time." (Syllabus of the court.) *Kirshen v. Kirshen*, 227 Neb. 479, 418 N.W.2d 558 (1988).

We also have held that "[t]he established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application." *Cunningham v. Lutjeharms*, 231 Neb. 756, 763, 437 N.W.2d 806, 812 (1989). See, also, *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984). However,

> [s]ince a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer.

People v. Morley, 725 P.2d 510, 516 (Colo. 1986). Similarly, the Iowa Supreme Court held that the standard for determining whether a provision of the Code of Professional Responsibility was unconstitutionally vague was "whether a 'reasonable attorney' would understand certain conduct to be prohibited . . . ." *Committee on Professional Ethics v. Durham*, 279 N.W.2d 280, 284 (Iowa 1979). See, also, *Matter of Sekerez*, 458 N.E.2d 229 (Ind. 1984).

DR 1-102(A)(6), when assessed in light of other terms of the Code of Professional Responsibility, has been determined not to be vague. See, e.g., *Committee on Professional Ethics v. Durham, supra*. In counts I and II, respondent was formally

charged with violating a disciplinary rule by failing to respond to letters of complaint. Respondent was required to respond pursuant to Neb. Ct. R. of Discipline 9(E) (rev. 1986). A reasonable attorney would understand that this type of conduct is prohibited and adversely reflects on his fitness to practice law. The record supports a finding that respondent violated DR 1-102(A)(6) in this respect.

We note that respondent was not charged with failure to provide management, supervision, and control of his office staff and procedures. Respondent's own testimony suggested, however, that his failure to respond to the Nuttelman and Suhr complaints is the fault of his secretary, whom he knew to be incompetent.

In *In re Ruffalo, supra*, the petitioner, an Ohio attorney, was charged in disciplinary proceedings with 12 counts of misconduct. During the hearing, a 13th count was added, based on testimony adduced at the hearing. The attorney was disbarred based, in part, on the misconduct charged in count 13. The Court determined that the attorney had not received fair notice as to the reach of the grievance procedure and the precise nature of the charges, depriving the attorney of procedural due process.

> In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. . . .
>
> These are adversary proceedings of a quasi-criminal nature. . . . The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

390 U.S. at 550-51.

Even though we conclude that the referee's finding that respondent violated DR 1-102(A)(6) by failing to provide management, supervision, and control of his office staff and procedures was in error, respondent's reliance on his secretary's alleged incompetence as a defense is entirely misplaced. While respondent's failure to properly supervise his employee was not charged against the respondent, such conduct does not constitute a defense to the misconduct charged. A lawyer may not avoid responsibility for misconduct by hiding behind an employee's behavior and may not avoid a charge of unprofessional conduct by contending his employees are incompetent.

The preliminary statement to the Code of Professional Responsibility as adopted by this court states, "A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client." "A lawyer also has responsibility to be aware at least of the major areas of responsibility and the actual work habits of employees and to exercise effective supervision." C. Wolfram, Modern Legal Ethics § 16.3.1 at 893 (West 1986).

In *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 142-43, 352 N.W.2d 875, 878 (1984), we said: "A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds." (Citations omitted.) Similarly, "[a]n attorney may not escape responsibility to his clients by blithely saying that any shortcomings are solely the fault of his employee. He has a duty to supervise the conduct of his office." *Attorney Griev. Comm'n v. Goldberg*, 292 Md. 650, 655-56, 441 A.2d 338, 341 (1982). We hold that a lawyer is ultimately responsible for the conduct of his employees and associates in the course of the professional representation of the client.

Respondent's testimony shows only that his failure to supervise his employee directly contributed to his failure to timely respond to the Nuttelman and Suhr complaints. He may not use his secretary's alleged incompetence to shield him from the consequences of his unprofessional conduct.

Respondent also contends that Larson's conduct in her allegedly "unauthorized" administrative interpretation of Neb.

Ct. R. of Discipline 9(C), (D), and (E) (rev. 1986) deprived him of due process of law. That rule provides:

> (C) When it appears to the Counsel for Discipline that allegations of misconduct fail to describe conduct which, if true, would constitute grounds for discipline, he may decline to further investigate and he shall so advise the Complainant in writing with a proper explanation within fifteen days of its receipt. All doubts shall be resolved in favor of an investigation.
>
> (D) If it appears to the Counsel for Discipline that allegations of misconduct do describe conduct which, if true, would constitute grounds for discipline, he shall notify the member against whom the allegations are directed that he is the subject of a complaint, and within fifteen days of its receipt furnish him a copy thereof by certified mail, return receipt requested.
>
> (E) Upon receipt of notice of a complaint from the Counsel for Discipline, the member against whom the complaint is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the complaint, or a response stating that he refuses to answer substantively and explicitly asserting constitutional or other grounds therefor. For good cause, the Counsel for Discipline may grant additional time for the filing of a response.

Respondent appears to argue that he had no duty to respond to Larson's February 21, 1986, letter forwarding the Suhr complaint because Larson's letter expressed doubt as to whether the Suhr complaint set forth sufficient facts to substantiate a complaint against respondent. Such an argument ignores the plain language of rule 9(C) that "[a]ll doubts shall be resolved in favor of an investigation." Larson chose to forward the complaint to respondent pursuant to rule 9(C) because under certain circumstances failure to pay a court reporter could constitute fraud or misrepresentation. If anything, respondent has been treated too leniently by those he had arrogantly chosen to ignore. In any event, the fourth letter on the Suhr matter was sent by certified mail, and that request also

was ignored by respondent.

We determine that Larson acted properly in demanding a response to the Suhr complaint. As such, rule 9(E) clearly required a response to the complaint within 15 working days of its receipt, or a response stating that respondent refused "to answer substantively and explicitly asserting constitutional or other grounds therefor." In a telephone conversation on June 24, 1986, respondent told Larson that a response would be in shortly, but did not advise her that he had written the June 14, 1986, letter to Carlson responding to the Suhr complaint. The referee concluded that even assuming respondent's June 14, 1986, letter was a part of the bundle of old correspondence discovered in August 1986, "it is incredible that the Respondent chose not to communicate this information to the Counsel for Discipline immediately upon discovery."

The record establishes by clear and convincing evidence that Larson's office did not receive a timely response to the Suhr and Nuttelman complaints, that Larson did not receive any response until just before the Committee hearing on March 18, 1987, and that respondent violated DR 1-102(A)(1) and (6) as alleged in counts I and II.

Respondent further complains he was deprived of due process of law with respect to counts I and II because (1) irrelevant evidence was admitted during the Committee hearing and before the referee, (2) respondent was examined before the Committee in a manner violative of Neb. Ct. Rules of Discipline 7(E)(5) and 9(H)(3)(b) (rev. 1986), (3) a Committee member acted as a witness by making comments during the Committee hearing, and (4) Larson testified, but failed to withdraw as prosecutor, at the Committee hearing.

Disciplinary proceedings are tried in the Supreme Court de novo on the record, and this court will not consider irrelevant evidence or evidence which was erroneously admitted. Cf., *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). There was no prejudice to respondent in this respect.

We further understand respondent to argue that but for alleged technical improprieties at the Committee level, he would not have been formally charged with misconduct. The

argument is similar to that of a criminal defendant complaining of a court's failure to grant a plea in abatement.

> It is the rule in this state that any error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of guilt beyond a reasonable doubt.

State v. Navarrete, 221 Neb. 171, 172, 376 N.W.2d 8, 9 (1985); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

> Although only those matters which are specifically charged in the complaint in a disbarment proceeding can be considered, a disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong.

State ex rel. Nebraska State Bar Assn. v. Leonard, 212 Neb. 379, 383-84, 322 N.W.2d 794, 796 (1982).

This matter advanced from the equivalent of a probable cause hearing before the Committee to a formal due process hearing before the referee and finally to a trial de novo on the record in this court. We have determined that the relevant evidence establishes the misconduct charged in counts I and II by clear and convincing evidence. Under these circumstances, any alleged errors at the Committee level are deemed cured. We determine that respondent was not deprived of due process of law during the Committee hearing and that the foregoing exceptions are without merit.

COUNT III

Count III of the formal charges alleges:

> 2. That on or about the 9th day of April, 1980, the Respondent entered his appearance in the Matter of the Estate of Medalo Tapia, Deceased, No. 35395, in the County Court of Lancaster County, Nebraska, by filing an Application for Informal Appointment of Personal Representative in Intestacy.
>
> 4 [sic]. That on or about November 13, 1984, Lancaster County Judge James Foster entered an Order to Show Cause to the Personal Representative of the Estate and on

December 3, 1984, a hearing was held on the order to Show Cause at which time the Respondent appeared and indicated that the Estate would be closed forthwith.

5. That on or about January 2, 1985, the Respondent filed a Final Accounting in the above-captioned matter which stated that attorney's fees had been paid in the amount of $25,557.00 to the Respondent and that $12,672.25 of this sum was "attributable to the Estate of William G. Tapia".

6. That as of the undersigned date [April 15, 1987], the Respondent has failed to obtain a County Inheritance Tax Determination in the above-captioned case.

7. That as of [April 15, 1987], the Respondent has failed to file the necessary documents to close the Estate.

That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office, as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

1. Violate a Disciplinary Rule.

5. Engage in conduct that is prejudicial to the administration of justice.

6. Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

3. Neglect a legal matter entrusted to him.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

2. Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

8. Whether the fee is fixed or contingent.

With respect to count III, the record shows that respondent was retained in December 1979 by Wesley A. Evans, who was later appointed personal representative of the Medalo Frances Tapia and William George Tapia estates. The estates were opened on or about May 16, 1980.

Evans informed respondent that his sister, Medalo Tapia, died on December 7, 1979, in an automobile accident in Waco, Texas, and that her husband, William, died at the couple's residence in Lincoln. William's death remained undiscovered for several days. It was eventually determined, however, that William predeceased Medalo by more than 120 hours. Respondent testified that Evans, who had a sixth grade education, wanted respondent to take care of everything.

Medalo Tapia died intestate. Her estate received approximately $60,000 of William's life insurance proceeds. The Medalo Tapia estate also received all of William's property pursuant to the terms of William's last will and testament. We

note that the first filing in the William Tapia estate was a "Demand for Notice" filed on February 26, 1980, by Valerie Norton. On July 15, 1980, Norton filed a $46,324.22 claim for delinquent child support against the William Tapia estate. Norton was informed by a notice filed December 17, 1984, that Evans, as personal representative of the William Tapia estate, would be unable to pay this claim "for [the] reason that there were insufficient funds available in the Estate to pay expenses of administration, and none available to pay claims."

The estates were initially complicated by the proximity of the deaths and thereafter by the difficulty of tracing estate property. When he began his investigation in December 1979, respondent discovered that the Tapia residence was strewn with a large number of personal papers, personal property (including objects of art consigned to Medalo), and classified Air Force documents. Respondent testified that Medalo had entered into bigamous marriages and used approximately 60 aliases and business names and that William had used 40 aliases. He further testified that he discovered approximately 22 possible insurance policies and had to investigate 41 banks to determine if accounts existed. Respondent stated that he spent considerable time tracing and returning consigned property, returning the classified documents to the FBI, returning government charge cards to the agency of issue, and disposing of charge cards issued to alias names.

Approximately 50 claims were filed, many of which were filed in both estates. Respondent testified that he performed an investigation of an Illinois bankruptcy, which permitted him to deny claims that had been discharged in bankruptcy. He also testified that neither William nor Medalo filed federal income tax returns in 1978, and possibly in previous years, and that he was therefore required to contact IRS service centers in Illinois, Iowa, and Nebraska. Respondent, however, was unable to obtain a "firm written understanding" from the IRS regarding the Tapias' income tax obligations.

Respondent also testified that he discovered evidence of an expensive diamond ring and several motor vehicles. These assets were investigated but never realized for the Medalo Tapia estate. Respondent traveled to Texas in February 1980 to

retrieve property from Medalo's automobile and to investigate a potential wrongful death claim. Respondent determined that a wrongful death claim would not significantly benefit the estate.

Respondent testified that he was still investigating these preliminary matters in 1982.

The Lancaster County Court probate file contains correspondence from Judge Gale Pokorny, dated November 2, 1983, stating that the court expected the Medalo Tapia estate to be closed in 30 days, and December 13, 1983, stating that the court expected the estate to be closed in 45 days or the respondent should schedule a date to personally appear before the court to show why the estate should remain open. Respondent wrote to Judge Pokorny on January 5, 1984, stating that the court's letters had only been recently forwarded to his new business address in Omaha. In this letter, respondent informed the county court (apparently for the first time) of the multitude of documents at the Lincoln residence, the several small business enterprises, Medalo's fraudulent marriages, and the difficulty with the IRS over the decedents' tax returns. Respondent stated that he had unsuccessfully attempted to seek advice from more experienced lawyers and welcomed the court's "direction to personally appear before the court in the immeidate [sic] future" to determine how to proceed.

On February 2 and 22, 1984, the county court again requested respondent to establish a timetable for closing the estates. On April 13, 1984, respondent replied, stating that "[u]pon receipt of your letters," respondent had unsuccessfully contacted the IRS. Respondent stated that he would go ahead and close the estates and advise the heirs to maintain a reserve for possible future tax liability.

Judge Pokorny wrote to respondent on June 18 and July 12, 1984, asking for an explanation as to why the Tapia estates were not closed and stating that if the estates were not closed within 30 days, the matters would be turned over to Dennis Carlson of the NSBA.

On August 8, 1984, Marguerite Evans, the 79-year-old mother and sole heir of Medalo Tapia, wrote to the court concerning the unreasonable delay in the processing of the

estate. On September 14, 1984, Judge Pokorny wrote to Evans and suggested that she contact the NSBA and pursue a complaint.

On October 1, 1984, County Judge James L. Foster wrote to respondent, stating that the estate "will be closed by November 1, 1984 or I will find someone who will see to it that it is closed." On November 13, 1984, Judge Pokorny entered orders to show cause why Wesley Evans should not be removed as personal representative of the Medalo Tapia and William Tapia estates for failure to distribute the property and settle the affairs of the decedents in a reasonable and timely manner. Notes by the county judge regarding a hearing on December 3, 1984, indicated that respondent appeared with the personal representative, that the estate will be closed with $4,343 retained in escrow for exposure on claims, and that a hearing on closing would be set for February 26, 1985.

An inventory was filed on December 11, 1984, showing the net value of approximately $60,000 representing insurance payable to the Medalo Tapia estate. Although the last claims date for both estates was published as August 24, 1980, no notices of disallowance of claim were filed until December 17, 1984.

On January 2, 1985, respondent filed in the Medalo Tapia estate a supplemental inventory, attorney and personal representative fee statements, a final accounting, and a formal petition for complete settlement after informal intestate proceeding. On January 28 respondent filed a petition for determination of inheritance tax and an inheritance tax worksheet, and, on February 1, filed proof of publication for the hearing on final settlement.

At a hearing before Judge Foster on February 25, 1985, the will of William Tapia was formally admitted to probate, and the heirs were determined. We note, in passing, that at this time William Tapia had been dead for approximately 5 years 3 months, and his estate had been pending for at least 4 years 9 months.

With respect to the Medalo Tapia estate, the court found that Medalo died intestate and that her sole heir was her mother, Marguerite F. Evans.

At the February 25 hearing, respondent acknowledged that Deputy Lancaster County Attorney Michael Thew had requested information and documentation "a few weeks back" regarding the inheritance tax worksheet. Thew wanted documentation on $37,000 to $38,000 worth of deductions. Respondent testified that he tried to set up a meeting with Thew right after the hearing, but Thew was not available. Respondent agreed to make an appointment with Thew to resolve inheritance tax deduction matters and resolve any questions or reservations concerning administrative expenses, which represented almost half of the entire estate.

From November 2, 1983, to February 25, 1985, the county court wrote to respondent 9 times, generally requesting that the estates be closed.

On September 22, 1984, Marguerite Evans filed a written complaint with the NSBA. This complaint was dismissed by Counsel for Discipline on October 8, 1984, pursuant to Neb. Ct. R. of Discipline 9(C) (rev. 1986). Rule 9(C), discussed above in connection with the Suhr complaint, allows Counsel for Discipline to dismiss a complaint if it appears that the allegations of misconduct fail to describe conduct which, if true, would constitute grounds for discipline. Carlson's letter of October 8 states that respondent had "related many of the facts which have caused delays in the Estate of Medalo Tapia" and that "[t]hese delays do not appear to be caused by a lack of diligence on the part of Mr. Kirshen." Marguerite Evans appealed this decision to the Committee, which affirmed the decision of Counsel for Discipline to dismiss the complaint, based in part on the extraordinary circumstances presented in the two estates. Correspondence among Committee members shows, however, that respondent said he intended to close the estate informally "and would have filed the appropriate papers . . . except for the illness of his Secretary." Respondent apparently represented to the Committee in 1984 that the IRS matter had been completed and that he would close the estate no later than December 31, 1984. It was the "unanimous view" of the Committee as of December 17, 1984, that there had been no violation of the Code of Professional Responsibility by respondent.

The referee concluded that after February 25, 1985, respondent "was not closing the estate over expenses which, if denied or not allowed, could only increase the inheritance tax by a maximum of $370 to $380." No order was entered on the inheritance tax determination until June 21, 1988, approximately 40 months after the February 1985 hearing.

On August 29, 1985, Marguerite Evans filed another complaint with Counsel for Discipline regarding respondent's failure to contact her or close the Medalo Tapia estate. The correspondence attached to the complaint indicates that respondent gave Marguerite Evans a distribution of $6,440.04 after Larson spoke to him on June 5, 1985, and that respondent told Marguerite Evans she would receive a final distribution of $4,343.23 after the February 1985 hearing. Respondent filed an admittedly "tardy" response to this complaint on November 7, 1985.

The response stated that respondent was still seeking "written clearance of tax liability" from the IRS, although "after consulting with the County Judge I determined to press ahead to close the Estate without a written confirmation." In his November 7 letter, respondent stated that "Mrs. Evans' needs are modest" and that she apparently had "dissipated" the $6,500 previously remitted to her. The letter further states that "[h]ad Mrs. Evans attended the [February 25, 1985,] hearing, of which she was given notice, she would have learned that additional documentation was required before the inheritance tax matter could be resolved." At this time, Marguerite Evans was approximately 80 years old and in poor health.

Larson received correspondence from Marguerite Evans dated October 10, November 7, and November 16, 1985; January 2, March 29, and May 31, 1986; and February 17, 1987, concerning respondent's failure to close the estate.

The record shows that Larson contacted respondent approximately 13 times between August 1985 and June 1986. Larson contacted respondent by letters dated September 3, October 16, November 8, and December 24, 1985, and January 3, January 14, and June 2, 1986, generally requesting status reports, the inheritance tax be resolved, and the estate closed. The record also shows that Larson contacted respondent by

telephone on September 18, October 24, and November 19, 1985, and on January 24 and April 3, 1986.

Respondent apparently ignored Larson's requests for a status report, and on June 11, 1986, Larson informed respondent that "[i]f a response is not received from you immediately, I will have little choice but to reopen this office's investigation regarding the complaint . . . ."

Wesley Evans, the personal representative of both estates, died on December 24, 1985. Marguerite Evans notified Larson of Evans' death by letter dated January 2, 1986. It is indicative of the attention that respondent was giving the estate matters that he first learned of Evans' death on April 3, 1986, during a telephone conversation with Larson. He was "surprised." Respondent did not inform the court of Evans' death until December 30, 1987, over 20 months after he learned of that fact. He now attempts to use Wesley Evans' death as an excuse for his nonperformance as a lawyer. The least he could have done was to inform the court of Evans' death.

The Medalo Tapia estate file contains correspondence from the county court dated January 16, February 27, April 30, October 2, and December 3, 1986, requesting that respondent close the Tapia estates. The record shows no reply to these letters. Nothing transpired in the Lancaster County Court estate file from February 25, 1985, until November 30, 1987, when James L. Rold, attorney for respondent, ordered a transcript of the February 25, 1985, hearing.

On December 30, 1987, respondent petitioned as an interested party for appointment of Steven M. Heinz as successor personal representative of the Medalo Tapia estate. This petition was based on the fact of the death of the personal representative and was prepared for respondent by his attorney, Rold. Heinz was so appointed on January 26, 1988. On June 7, 1988, Rold, as attorney for the successor personal representative, filed a supplemental inventory, a petition for determination of inheritance tax, a formal petition for complete settlement, and a schedule of distribution.

A hearing was held on June 21, 1988. That day, Judge Foster entered the following orders: (1) an order finding that $17,732.09 was a proper and necessary attorney fee to

respondent to close the estate of Medalo Tapia (this amount was exactly that set out in respondent's affidavit seeking fees and the inheritance tax worksheet filed June 20, 1988; it apparently was not questioned by the county court), (2) an order finding that $1,000 was a proper fee for the successor personal representative, (3) an order determining the inheritance tax in the amount of $149.62 assessed against the share of Marguerite Evans, plus interest in the amount of $157.91, and (4) a formal order for complete settlement subject to the verified cashing of the distribution check and payment of court costs and inheritance tax.

As of April 6, 1988, neither estate had been closed. The June 21, 1988, county court hearing concerned only the Medalo Tapia estate. Respondent testified that there was only one estate bank account. Respondent testified he was a signer on the account at the request of Wesley Evans. Respondent prepared and paid his statement of February 25, 1985, in the amount of $2,480.60. This statement was marked "Final," with many references in the statement itself to "closing" the estate. The record shows that respondent had paid himself over $27,000 in fees, with approximately $17,000 allocated to the Medalo Tapia estate.

The referee assumed that as of June 29, 1988, the William Tapia estate had not been closed, noting that there was no evidence on the disposition of that estate. The referee's report concluded:

> The Final Resolution of the William Tapia Estate should result in a payment of up to approximately $10,000 from the Respondent to the William Tapia Estate as a refund of excessive attorney fees. The William Tapia Estate simply pours over to the Medalo Tapia Estate and therefore the Medalo Tapia Estate cannot be resolved and closed until the William Tapia Estate is finally resolved and closed.
>
> It is the opinion of the Referee, that the Respondent should not seek nor receive any fee in the William Tapia Estate since the fee approved by the Court on June 21, 1988 in the Medalo Tapia Estate is more than generous for the reasonable amount of work and effort that should

have been sufficient to resolve both estate proceedings shortly after the February 25, 1985 hearing on closing both estates.

Respondent offered into evidence a release executed by Marguerite Evans dated June 25, 1988, which states that she releases respondent from any liability for his performance in the representation of the estate of Medalo Tapia and withdraws her complaint filed with the NSBA concerning respondent's conduct. On the bottom of the release, however, appears a statement that Evans "retains her rights and this release shall not apply to the misallocation of the two said checks, namely one to Evans Construction Co. for $2,069.25 and one to M.U.D. for $281.03." This statement refers to the schedule of distribution which shows estate funds paid to Evans Construction Company and to M.U.D. as being distributions to Marguerite Evans. The record contains neither a formal closing receipt executed by Marguerite Evans nor a discharge of the personal representative by the court. The release executed by Evans continues to clearly state her continuing dissatisfaction with respondent's conduct.

The Committee is empowered by Neb. Ct. R. of Discipline 7(E)(6) and (7) (rev. 1986) to conduct investigations of a complaint independent of the Counsel for Discipline and to investigate, on its own motion, any act of unprofessional conduct of a member. No formal charges are considered by this court until they have been considered by a Committee on Inquiry and the Board. Neb. Ct. R. of Discipline 9(M) (rev. 1986). Under our rules of discipline, Marguerite Evans had no standing to maintain a disciplinary action against respondent or any authority to effectively discharge a complaint. Cf. *Mattice v. Meyer*, 353 F.2d 316 (8th Cir. 1965). Consequently, the existence of a release is not determinative.

Respondent attributed his failure to close the Tapia estates to the complexity of the estates, the death of the personal representative, and personal problems and overwork in 1986. Respondent also testified that he was unable to resolve the inheritance tax issues in 1985 because Wesley Evans' ex-wife, who had been doing bookkeeping for the estate, absconded with the backup documentation and also because Thew had

been unavailable both times respondent contacted him after the February 25, 1985, hearing.

As to count III, the referee found that respondent violated DR 1-102(A)(6) and DR 6-101(A)(3) by:

> 1. Neglecting for a period of eleven months, from 1-5-84 to 12-3-84, to appear before the Lancaster County Court, an opportunity that Respondent "welcomed", but neglected until responding to an Order to Show Cause;
>
> 2. Neglecting to resolve an Inheritance Tax deduction item of nominal value to the ultimate beneficiary for a period of at least ten months from 2-25-85 to 12-24-85, the date of death of the Personal Representative; or for the actual period of forty months from 2-25-85 to 6-21-88;
>
> 3. Neglecting to contact the Lancaster County Court and communicate the fact of the death of the Personal Representative after Respondent first learned of that fact on 4-3-86;
>
> 4. Neglecting to take any responsibility for the estate for a period of twenty months from 4-3-86 until 12-30-87 when Respondent, as an interested party, signed a Petition for the appointment of a Successor Personal Representative.
>
> 5. Neglecting the recommendation of the Referee in October 1987 and the continuance of these proceedings in February 1988 to close both [the Medalo Tapia and William Tapia] estate administration proceedings in Lancaster County Court.

The referee also found there was no valid basis for the neglect in failing to close both the Medalo Tapia and William Tapia estates shortly after February 25, 1985.

Respondent first contends that evidence of Marguerite Evans' 1984 complaint was improperly admitted and that his actions prior to December 17, 1984, in the Tapia matter are res judicata. This contention is based on the fact that the Committee determined in 1984 that respondent was not in violation of the Code of Professional Responsibility. We find no merit in this contention.

> The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. . . .

> The doctrine rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.

Graham v. Waggener, 219 Neb. 907, 909-10, 367 N.W.2d 707, 709 (1985). See, also, *Mississippi State Bar v. Young*, 509 So. 2d 210 (Miss. 1987). The dismissal of Marguerite Evans' first complaint occurred at a preliminary inquiry stage, after respondent promised to the Committee that he would close the estate no later than December 31, 1984. The matter was never formally adjudicated; therefore, the doctrine of res judicata does not apply.

Respondent next argues that since his actual client was the personal representative, Wesley Evans, he had no duty to the estate after December 24, 1985, the date of Evans' death. We first note that respondent learned of Evans' death on April 3, 1986, but failed to notify the county court that his client had died even after receiving correspondence from the court dated April 30, October 2, and December 3, 1986, demanding that the Tapia estates be closed. Neb. Ct. R. of Cty. Ct. 5 (rev. 1989) allows an attorney of record to withdraw for good cause shown, but only after the court enters an order authorizing the withdrawal. Similarly, Neb. Ct. R. of Cty. Ct. 6 (rev. 1989) provides that when counsel's employment has been terminated, "counsel shall immediately file notice of it, and serve a copy upon all other parties to the suit." Rule 6 at 13.2.

The fact that these estates were still open in 1988 is a direct consequence of respondent's unprofessional conduct in failing to notify the court of Evans' death. His assertions to the contrary are without merit.

The evidence is clear and convincing that respondent violated DR 6-101(A)(3) and DR 1-102(A)(6) by his egregious neglect of the Medalo Tapia estate.

DISCIPLINE TO BE IMPOSED

Respondent finally contends that the referee's recommendation of 1 year's suspension is too harsh. Not only do we determine that the referee's suggested sanction on respondent is not too harsh, we determine that the suggested

sanction is too lenient.

In *State ex rel. NSBA v. Rasmussen, ante* p. 53, 55, 439 N.W.2d 481, 483 (1989), we said:

> The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.

See, also, *State ex rel. NSBA v. Cohen*, 231 Neb. 405, 436 N.W.2d 202 (1989). Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. *State ex rel. NSBA v. Rasmussen, supra*; *State ex rel. NSBA v. Frank*, 214 Neb. 825, 336 N.W.2d 557 (1983). Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Rasmussen, supra.*

The record shows that respondent received a private reprimand on October 25, 1985, for failing to respond to a client's complaint, in violation of DR 1-102(A)(1), (5), and (6). Since that time, respondent has substantially ignored and neglected numerous contacts by the county court and by Counsel for Discipline.

As an attorney licensed to practice law in the State of Nebraska, respondent submitted to the exclusive disciplinary jurisdiction of this court. His failure to respond to the Nuttelman and Suhr complaints and his grudging cooperation in the investigation and attempted resolution of the Tapia estates evidence respondent's disrespect for our disciplinary jurisdiction and his lack of concern for the protection of the public, the profession, and the administration of justice.

In submitting a pleading, "Motion For Orders Concerning Case Progression Standards and Attorney Fee," respondent further showed his unfitness to be a practicing lawyer. This pleading was filed in the county court on June 20, 1988. Included in it are respondent's assertions that part of the

problems for his long delay in acting was "j. An alcoholic personal representative who eventually committed suicide."

As a further excuse, respondent also asserted "k. That counsel's efforts in this matter were frustrated by his relationship with the eighty plus year old distributee who caused counsel to be investigated twice by the Nebraska Bar Association."

In his November 7, 1985, letter to Larson, respondent states as follows:

> Apparently Mrs. Evans is anxious for the remainder of the funds coming to her after inheritance tax has been made and final settlement effected. I do not know what she has done with the $6500 previously remitted to her, but Mrs. Evans' needs are modest and there has been concern about others seeking to get their hands on Mrs. Evans' inheritance, even to the point of family members considering the possibility of a conservatorship. If Mrs. Evans is in due need of the balance due her, apparently the prior remittance is now dissipated.

This further shows respondent's ignorance of his role as lawyer for the personal representative. The money was not respondent's, but was the property of Marguerite Evans to do with as she would.

A lawyer, with the great responsibilities that that position requires, should not disparage his clients or those for whose benefit he is purportedly acting, and hide behind their alleged faults to excuse his own ineptitude. Not only is such an approach unmannerly and unseemly, it is not recognized as a defense to disciplinary matters. If a lawyer accepts a case, that case must be handled professionally. If, due to personal relationship problems, the lawyer cannot handle his responsibility, the lawyer must withdraw and turn the matter over to a lawyer who has the competence and integrity to conclude the legal matter properly.

Respondent has not so conducted himself in this case. As defenses he relies on alleged bad personal circumstances of his client, the personal representative; the age of the distributee; the conduct of the Assistant Counsel for Discipline; the conduct of the Committee; and, indeed, the conduct of all involved with

him. He has never expressed concern for the distributee, who is now approximately 84 years old, although she was a young 75 years old when her daughter died.

Such conduct is not that of a lawyer who holds himself out to represent members of the public.

The record shows that respondent's conduct is not an isolated incident, but a continuing pattern of neglect and contempt for the disciplinary rules adopted by this court. The record clearly demonstrates that respondent has violated his oath of office and the disciplinary rules cited by the referee. We have no confidence that a public reprimand, or even suspension, would serve to modify respondent's attitude or to protect the public. We recognize that disbarment is a harsh penalty. We conclude that in the circumstances of this case, a judgment of disbarment is appropriate.

Finally, we must address a remaining problem. The record before us does not indicate that the Tapia estates are closed even yet. The findings of the referee set out with regard to the interrelation of the William Tapia and Medalo Tapia estates are as follows:

> The Corrected Final Accounting [in the Medalo Tapia estate] filed on June 20, 1988 had a balance of approximately $11,500.00. The Respondent did not offer any evidence as to the amount of the "final distribution check" that Mr. Heinz attempted to deliver to the sole beneficiary, Marguerite Evans.
>
> There was no evidence on the disposition of the William Tapia Estate and therefore, the referee assumes that the William Tapia Estate has still not been closed.
>
> The Final Resolution of the William Tapia Estate should result in a payment of up to approximately $10,000 from the Respondent to the William Tapia Estate as a refund of excessive attorney fees. The William Tapia Estate simply pours over to the Medalo Tapia Estate and therefore the Medalo Tapia Estate cannot be resolved and closed until the William Tapia Estate is finally resolved and closed.
>
> It is the opinion of the Referee, that the Respondent should not seek nor receive any fee in the William Tapia

> Estate since the fee approved by the Court on June 21, 1988 in the Medalo Tapia Estate is more than generous for the reasonable amount of work and effort that should have been sufficient to resolve both estate proceedings shortly after the February 25, 1985 hearing on closing both estates.

Our concern is that no court seems to be exercising any control over these two estates. A county court has inherent power to enforce the administration of judicial matters before it.

After the Medalo Tapia estate had been open for more than 8 years at the time of the June 1988 hearing to "close" that estate, some court should exercise its jurisdiction to see that this matter is concluded.

When an estate reaches the state of confusion these estates did, the overall supervisory powers of the county court must be brought into play. Close examination of the convoluted pleadings in the Medalo Tapia estate would show many things that a court should check. Among other things, in his "Affidavit In Support Of Attorney's Fees," respondent states: "9. That Mrs. Tapia had a brother and children from a former marriage that had to be dealt with." Of course, if such a statement were true, as respondent swore in his affidavit, Medalo Tapia's mother would not be the "sole distributee" in Medalo Tapia's estate. See Neb. Rev. Stat. § 30-2303 (Reissue 1985). Whether there are progression standards or not, a court has the obligation to so conduct the legal business before it as to render the services to the public that are the purpose of the court's institution.

In the case before us, we are not concerned with an appeal from any orders of the county court. As far as we know, no such appeals have been taken. We do know, however, that the record before us shows that respondent has received $10,000 or $12,000 from the $2,000 estate of William Tapia. Some court has the duty to straighten that out.

The county court has determined that a requested fee of $17,732.09 in the Medalo Tapia estate is a "proper, necessary attorney fee to close this estate." The court, insofar as the record before us shows, had not made a fee award in the

William Tapia estate. The county court should exert every effort to finally close both estates and to give to Marguerite Evans the justice she has sought since 1984.

JUDGMENT OF DISBARMENT.

CITIZENS NATIONAL BANK OF WISNER ET AL., APPELLANTS AND CROSS-APPELLEES, V. KENNEDY AND COE, A PARTNERSHIP, ET AL., APPELLEES AND CROSS-APPELLANTS.

441 N.W.2d 180

Filed June 9, 1989. No. 87-856.

1. **Fraud.** The elements of fraudulent misrepresentation are: (1) A representation was made; (2) the representation was false; (3) when the representation was made, it was known to be false or was made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that it would be relied upon; (5) there was reliance upon the representation; and (6) damage occurred as a result.
2. **Fraud: Proof: Evidence.** The correct standard of proof in an action for fraud tried to a court of law is proof by a preponderance, or greater weight, of the evidence.
3. **Accountants: Fraud.** An accountant's duty of reasonable care is to his client and generally does not extend to third parties absent fraud or other facts establishing a duty to them.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Reversed and remanded for a new trial.

William G. Dittrick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

John F. Thomas, of McGrath, North, O'Malley & Kratz, P.C., for appellees.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

FAHRNBRUCH, J.

Three Nebraska banks appeal the Platte County District Court's ruling that the appellees, all certified public accountants, are not liable for damages suffered by the banks

when a mutual client defaulted on a commercial loan. In this law action, the banks allege fraudulent misrepresentation and negligence on the part of the accountants in connection with the loan. We reverse the trial court and remand the cause for a new trial.

Plaintiffs-appellants and cross-appellees are Citizens National Bank of Wisner, Northwestern National Bank of Omaha, both national banks, and Bank of Leigh, a state chartered bank (Banks). The original defendants were Kennedy and Coe, a partnership; LeRoy Jones; Frank Laubhan; Timothy Gottschalk; and David Duren & Associates, a professional corporation; all of whom practice certified public accounting (Accountants). David Duren & Associates was dismissed as a defendant before trial and is not a party on appeal.

In view of our rulings, an abbreviated recitation of the facts is sufficient. On January 15, 1981, the Banks entered into a $500,000 loan agreement with Duncan Feeders, Inc. (DFI), through its president, Ronald Seaton. In deciding to grant the line of credit to DFI, Banks reviewed financial compilations prepared by Accountants. Moneys were advanced on the line of credit. The loan was soon in default.

After trial, the judge found: (1) that the Accountants did not fraudulently misrepresent DFI's financial condition to the Banks; (2) that where an accountant knows a third party is relying on statements prepared by him, an accountant has a duty of reasonable care to that third party; (3) that in this case, the Accountants by their conduct waived the disclaimer attached to the financial compilations; and (4) that the Banks were contributorily negligent in a degree sufficient to bar their recovery in their negligence claims.

In their appeal, the Banks claim the trial court erred (1) in not finding the Accountants guilty of fraudulent misrepresentations due to the court's applying (a) the "wrong burden of proof" and (b) the wrong elements in determining whether fraudulent misrepresentation existed, (2) in its findings regarding the Accountants' negligence, and (3) in finding the Banks contributorily negligent. In their cross-appeal, the Accountants claim the trial court erred in finding that the

Accountants had a duty of reasonable care to the Banks and were negligent.

In determining whether the Accountants made fraudulent misrepresentations, the trial court erroneously required the Banks to prove that the Accountants made misrepresentations to the Banks with the intent to deceive.

The case was tried in January and February of 1986. At that time, a line of cases existed requiring "intent to deceive" as an element of fraudulent misrepresentation. Another line of cases did not make such a requirement. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), decided June 20, 1986, settled this conflict by overruling those cases requiring "intent to deceive" as an element of fraudulent misrepresentation. The judgment was reversed and the cause remanded for a new trial. Since that time, elements of fraudulent misrepresentation have been: (1) A representation was made; (2) the representation was false; (3) when the representation was made, it was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that it would be relied upon; (5) there was reliance upon the representation; and (6) damage occurred as a result.

Although the Banks' contention that the trial court applied the wrong standard of proof is not supported by the record, we note that the correct standard of proof in an action for fraud tried to a court of law is proof by a preponderance, or greater weight, of the evidence. See, *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989); NJI2d 2.12A.

Because this case will have to be retried in its entirety in view of our rulings herein, we also discuss the issue of negligence. Both the Banks and Accountants, as did the trial court, recognized that this court has not decided the extent of an accountant's duty of care to third parties.

In determining negligence, the trial court declared in its order:

> "One [who] is under a duty to exercise reasonable care and who fails to disclose a fact which he knows may justifiably induce another to act or refrain from acting in a business transaction is liable as though he had represented the nonexistence of the matter he has failed to disclose. He has

> a duty to subsequently inform that mislead [sic] party when he finds that the information that he has given before is untrue. Facts basic to a transaction if one knows the other is about to enter into an agreement under a mistake should resonably [sic] be expected to disclose those facts to the one who is going to act upon them."

This rule is an interpretation by the trial judge of Restatement (Second) of Torts § 551 (1977).

We decline to adopt the trial court's rule. Rather, this court's ruling regarding an attorney's duty of care to third parties is extended to accountants.

The rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them. *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988); *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983).

We now hold that an accountant's duty of reasonable care is to his client and generally does not extend to third parties absent fraud or other facts establishing a duty to them. See, also, *First Florida Bank v. Max Mitchell & Co.*, 541 So. 2d 155 (Fla. App. 1989) (holding that "in the absence of privity there can be no liability on the part of an accountant for even gross negligence, unless it amounts to fraud"); *Howard v. Dun & Bradstreet, Inc.*, 136 Ga. App. 221, 220 S.E.2d 702 (1975) (holding that an accountant has no duty to third parties, even those who accountant knew or should have known were relying on his audit; liability can be found only upon fraudulent conduct, and proof of mere negligence will not suffice).

REVERSED AND REMANDED FOR A NEW TRIAL.